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In the Supreme Court of the United States

October Term A. D. 1957

No. 427

NORTH CENTRAL PUBLIC SERVICE COMPANY,
IOWA PUBLIC SERVICE COMPANY,
IOWA POWER AND LIGHT COMPANY,
IOWA ELECTRIC LIGHT AND POWER COMPANY,
and COUNCIL BLUFFS GAS COMPANY,

Petitioners,

vs.

NORTHERN NATURAL GAS COMPANY, and
FEDERAL POWER COMMISSION,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

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COCKLE PRINTING COMPANY, LAW BRIEFS, OMAHA

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NORTHERN NATURAL GAS COMPANY, and
FEDERAL POWER COMMISSION,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

To The Honorable Earl Warren, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

The Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this cause on May 14, 1957.

OPINION OF LOWER COURT

The opinion of the United States Court of Appeals for the Eighth Circuit has not been reported. A copy is appended hereto as Appendix D.

Since the printing of this Petition, the Opinion of The United States Court of Appeals for the Eighth Circuit, in this case, is reported as follows: *Northern Natural Gas Company vs. Federal Power Commission*, 245 Fed. 2nd 447.

GROUNDS FOR JURISDICTION

(1) The decree and judgment sought to be reviewed was entered May 14, 1957.

(2) The order denying the timely petition for rehearing is dated June 24, 1957.

(3) Jurisdiction to review this decree is conferred upon the Supreme Court of the United States by 62 Stat. 928 (Title 28, Section 1254, U. S. C. A.).

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QUESTIONS PRESENTED

I.

Whether the decree of the United States Court of Appeals for the Eighth Circuit is in conflict with the decision of the Supreme Court of the United States in the case of *Central States Electric Company v. City of Muscatine*, 324 U. S. 138, 65 S. Ct. 565, 89 L. Ed. 801.

II.

Whether the United States Court of Appeals for the Eighth Circuit has the power and jurisdiction to decree refunds to the local consumers of natural gas of the petitioners in view of the decision in *Central States Electric Company v. City of Muscatine*, 324 U. S. 138, 65 S. Ct. 565, 89 L. Ed. 801, on the undisputed record that these petitioners are local distributing companies, engaged solely in the local sale and distribution of natural gas in intrastate commerce in Iowa not subject to the jurisdiction of the Federal Power Commission, and their activities specifically excepted from the provisions of the *Natural*

Gas Act, 52 Stat. 821 (Title 15, Section 717(b); U. S. C. A.); that the rates charged their local consumers are fixed by the municipalities they serve, pursuant to legislative mandate of the State of Iowa, Section 397.28, Code of Iowa 1954, *Pell v. City of Marshalltown*, 241 Iowa 106, 40 N. W. 2nd 53; that these petitioners actually paid more for natural gas purchased by them during the period of the stay, even assuming the payment to them of the entire amount of the refunds, than they paid for natural gas at the time of the establishment of their local rates and for the year 1954, immediately prior to the stay order; that they did not increase their rates as the result of the stay; and that there is no controversy between petitioners and their ultimate consumers who have made no claim to be entitled to said refunds.

III.

Whether the decree of the United States Court of Appeals for the Eighth Circuit is in conflict with its prior decision in the case of *Northern Natural Gas Company v. Federal Power Commission*, 215 F. 2nd 892, and the decisions of the United States Court of Appeals for the Tenth Circuit in the case of *Cities Service Gas Company v. Federal Power Commission*, 176 F. 2nd 548, and of the United States Court of Appeals for the Fifth Circuit in the case of *Interstate Oil Company v. Federal Power Commission*, 181 F. 2nd 833.

IV.

Whether questions of public importance which it is in the public interest to have decided by the Supreme Court of the United States are involved in this case since

those questions concern all local distributors of natural gas throughout the United States, their ultimate consumers, and the various states under whose jurisdiction they operate, involve encroachment upon the rights of the states and of local distributors by unwarranted action of the Federal Courts, and are continually arising because of the repeated demands of pipeline companies for increases in the rates charged by them to local distributors such as these petitioners.

V.

Whether the decree of the United States Court of Appeals for the Eighth Circuit deprives these petitioners of their property without due process of law in violation of the Fifth Amendment to the Constitution of the United States by ordering the refunds, collected from them by Northern Natural Gas Company, paid to their ultimate consumers when the rates charged by petitioners are fixed and controlled by the governing bodies of the municipalities they serve in Iowa under the law of Iowa and were not raised to offset the increase in wholesale rates paid by them to Northern Natural Gas Company under the provisions of the stay order.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment V, Constitution of the United States.

"* * * nor be deprived of * * * property, without due process of law."

52 Stat. 821, Title 15, Section 717(b), U. S. C. A.

"The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas."

Section 397.28, Code of Iowa, 1954.

"They [cities and towns] shall have the power to require every individual or private corporation operating such works or plant, subject to reasonable rules and regulations, to furnish any person applying therefor, along the line of its pipes, mains, wires, or other conduits, with gas, heat, water, light, or power, and to supply said city or town with water for fire protection, and with gas, heat, water, light, or power for other necessary public purposes and to regulate and fix the rent or rate for water, gas, heat, light, or power; to regulate and fix the rents or rates of water, gas, heat, and electric light or power; to regulate and fix the charges for water meters, gas meters, electric light or power meters, or other device or means necessary for determining the consumption of water, gas, heat, electric light or power, and these powers shall not be abridged by ordinance, resolution, or contract."

Section 397.2, Code of Iowa, 1954.

"They [cities and towns] may grant to individual or private corporations the authority to erect and maintain such works or plants for a term of not more than twenty-five years, and may renew, amend or ex-

tend the terms of the grant; but no exclusive franchise shall be granted, amended, extended, or renewed."

Section 397.1, Code of Iowa, 1954.

Gas distributing system is "such works or plants" under this section.

STATEMENT OF THE CASE

These petitioners are public utility companies, engaged in the local sale and distribution of natural gas to consumers in Iowa municipalities. They purchase their supply of natural gas from Northern Natural Gas Company which is engaged in the production, transportation, sale and distribution of natural gas in interstate commerce.

Northern Natural Gas Company and its rates are subject to the jurisdiction and control of the Federal Power Commission under the Natural Gas Act. These petitioners and the rates charged by them are not. The rates charged by them to their consumers in the Iowa communities they serve are fixed and determined by the municipalities through their governing bodies. The rate making power over their rates has been vested in the municipalities of Iowa by its legislature.

These petitioners sell and distribute natural gas in these municipalities under franchises granted by vote of the qualified electors. Their rates are at all times established and controlled by the municipalities they serve. They cannot raise or lower rates. That is done by the action of the governing bodies of such municipalities.

On November 18, 1955, the United States Court of Appeals issued its stay order (Appendix B) on application of Northern Natural Gas Company under which that company was permitted to collect from these petitioners the funds in controversy. Northern Natural Gas Company is now engaged in paying back those funds. The court, by its Order on Distribution of Accumulated Stay Funds, entered May 14, 1957 (Appendix D), directed Northern Natural Gas Company to pay this money to petitioners' consumers and, by its order, entered June 24, 1957 (Appendix E), denied petitioners' petition for rehearing. The petition for writ of certiorari requests that this court review such action by the lower court.

Northern Natural Gas Company serves a tremendous geographical area. Proceedings were had before the Federal Power Commission to divide that area into zones and to establish zone rates for each zone. Federal Power Commission, by its Opinion No. 281 (Appendix A), determined that the territory served by Northern Natural Gas Company should be divided into zones with separate rates for each zone. This decision was later affirmed by the United States Court of Appeals for the Eighth Circuit. (*Interstate Power Company v. Federal Power Commission*, 236 F. 2nd 372. Cert. denied 352 U. S. 967. Also *Northern Natural Gas Company v. Federal Power Commission*, 236 F. (2) 372, cert. denied, 352 U. S. 967; 77 S. Ct. 352, 1 L. Ed. (2) 321.)

To prevent the immediate application of the Federal Power Commission opinion to its rates, Northern Natural Gas Company obtained the stay order (Appendix B). This permitted it to collect the rates it was then charging

these petitioners, pending the final determination of the zone rate litigation. Northern Natural Gas Company was then collecting from these petitioners for natural gas purchased by them at an increased rate under the Fifth Rate Increase subject to refund, pending final determination of the rates.

Zone 2 is one of the zones into which the territory of Northern Natural Gas Company was divided. This action involves that zone and the funds collected from these petitioners for natural gas purchased by them for sale and distribution to their consumers in Iowa municipalities located in Zone 2 during the period from September 27, 1955, the original date for which the stay order became effective, to December 27, 1956, the date on which the stay order was ended by the court.

By virtue of the stay order (Appendix B), Northern Natural Gas Company continued to collect from these petitioners during the period of the stay on the basis of its Fifth Rate Increase except as this rate was voluntarily reduced. The Fifth Rate Increase was translated into applicable zone rates for the zones established by the Federal Power Commission. Thus, Northern Natural Gas Company during this time collected from these petitioners for natural gas purchased by them for Zone 2 the same number of dollars as it would have collected without the zone rate decision (Appendix A).

When the zone rate litigation ended adversely to Northern Natural Gas Company, it moved to vacate the stay order. By order (Appendix B), dated January 23, 1957, the court vacated it. Thereafter, upon Northern Natural Gas Company's application to make refunds the

court entered its order of May 14, 1957 (Appendix D), directing that the funds collected from these petitioners by Northern Natural Gas Company during the period of the stay in Zone 2 be paid, not to the petitioners, but to their consumers in Zone 2.

This order of the court is challenged by this petition for writ of certiorari. It is the contention of the petitioners that the facts in the record before the United States Court of Appeals for the Eighth Circuit were undisputed and are substantially as set out in this statement of the case; that there was no factual basis for the court's order; that, therefore, it operated to deprive these petitioners of their property without due process of law.

The refunds now being made by Northern Natu al Gas Company represent the difference between the amount actually collected by it from these petitioners during the stay period and the amount it would have collected from them under the zone rates for Zone 2 during the stay period, had the stay order not been in effect.

The rates and rate schedules of each of the petitioners in communities served by them in the territory finally designated as Zone 2 had been established by proper and appropriate action of those municipalities. They were in effect prior to Northern Natural Gas Company's Fifth Rate Increase. These petitioners were selling and distributing natural gas to consumers in these municipalities on the basis of the rates and rate schedules so established by the governing bodies of the municipalities served.

These petitioners did not at the time the Fifth Rate Increase was imposed on them, or thereafter, increase the

rates charged by them to their consumers for natural gas sold them in said communities in Zone 2. Although the rates so imposed were greatly higher than the rates they had been paying for natural gas purchased from Northern Natural Gas Company in 1954, they absorbed these increases and did not pass them on to their consumers. Petitioners anticipated there would be some relief under the zone rate decision when entered. No municipality in Zone 2 served by them increased the rates and rate schedules in effect.

The additional sums of money collected from Petitioners under the stay order, which Northern Natural Gas Company is now repaying, were not collected by them from their consumers. No consumer paid any part of it. Provision for these payments and the payments themselves were, and had to be, paid by each of these petitioners out of other corporate funds.

The lowest contract demand rate established in Zone 2 for any part of the stay period to be paid by the petitioners to Northern Natural Gas Company is $2.04 per MCF per month. The maximum demand rate paid by them in 1954 was $1.97, with minor variations as to each petitioner. This was substantially the cost of natural gas to the petitioners in 1954 so that the establishment of zone rates did not reduce the cost of natural gas to them at any time during the stay period below what they had been paying for natural gas in 1954. Actually, after the establishment of zones and zone rates, these petitioners paid more for natural gas than they had been paying. The previous rate in effect in 1954 was a contract demand rate of $2.21 per MCF per month with an 80% ratchet

provision which made the rate equivalent to a contract demand rate of $1.77 per MCF per month and operated to produce an actual equivalent contract demand rate of $1.97 per MCF per month for the natural gas purchased by petitioners for the year 1954, with as stated minor variations between them.

Since 1950, Northern Natural Gas Company has applied to the Federal Power Commission for and received five increases in the rates charged by it for natural gas sold by it to these petitioners and other local distributors, and is presently applying for yet another rate increase. This situation exists in the entire industry so that local distributors, purchasing natural gas from other pipe line companies find themselves in the same position as the petitioners. When such application is made by the interstate pipeline, the rate requested goes into effect under bond and the local distributors are compelled to pay it. When the amount of the increase granted, if any, is finally determined by the Federal Power Commission or by the United States Court of Appeals on appeal from the commission's order, then the interstate pipeline is compelled to refund that portion of the increased rate which was disallowed.

In this case, the same procedure was followed, translating Northern Natural Gas Company's Fifth Rate Increase into zone rates. These petitioners did not pass the increase on to their ultimate consumers. To do so would have meant making application to each municipality in which they held a gas franchise to increase the rates and rate schedules in effect and then, when the final pipeline rate was determined, again applying for an appropriate decrease in such rates and rate schedules.

Rather than engage in continuous negotiations with the municipalities served over the rates to be charged ultimate consumers, these petitioners did not raise their rates and rate schedules but chose to pay the increases exacted from them out of their own funds without calling on their ultimate consumers to pay any part thereof. In doing so, they relied upon the fact that this was a question of local rate making, solely within the jurisdiction of the State of Iowa, and upon the principle stated by the United States Court of Appeals for the Eighth Circuit in *Northern Natural Gas Company v. Federal Power Commission,* 215 F. 2nd 892, 898 that local distributors who "made no rate increases to their customers of any kind during the period of the stay, and so have not passed along the amount paid by them to Northern under the stay * * * are entitled to an unconditional order of refund."

The proceedings resulting in the establishment of zone rates required these petitioners to pay an increased price for natural gas purchased for Zone 2. These proceedings did not effect a reduction in rates to them; they effected an increase in rates so that they were compelled to pay, on the lowest rate established for Zone 2, $2.04 per MCF per month for natural gas that they had been buying for $1.97 per MCF per month all during 1954. If these petitioners are paid the entire amount of the refunds, they still will be thousands of dollars out of pocket because of the increase between the final zone rates for Zone 2 over the rates paid for 1954 by them to Northern Natural Gas Company.

Apparently the Eighth Circuit Court of Appeals based its order of May 14, 1957 (Appendix D), upon the

erroneous assumption that the net effect of the rate increases by Northern Natural Gas Company and the imposition of zone rates was a decrease in the rates paid by these petitioners and that they should have decreased their local rates accordingly. This is not true. The net effect of all these proceedings was an increase in rates charged these petitioners, not a decrease, from an average of $1.97 per MCF per month to a rate of $2.04 per MCF per month on the lowest applicable Zone 2 rate, with increases also in the commodity and overrun charges from $0.221 to $0.224 per MCF per month.

The basis for federal jurisdiction in the United States Circuit Court of Appeals for the Eighth Circuit is the *Natural Gas Act*, 52 Stat. 821, Title 15, Chapter 15 B, Sections 717 through 717 W, U. S. C. A. and particularly Section 717 R(b).

Reasons for Granting the Writ
I and II.

The decree is in conflict with the decisions of the Supreme Court of the United States.

The decision of the Supreme Court of the United States in *Central States Electric Company v. City of Muscatine*, 324 U. S. 138, 65 S. Ct. 565, 89 L. Ed. 801 is controlling in this case. The decree of the lower court is in conflict with that decision. That court did not attempt to distinguish either the factual or legal situation in that case from the present one. In entering its decree, it ignored the decision in the Muscatine case.

If the lower court had attempted to analyze the controversy before it in the light of the Muscatine decision,

it would necessarily have found for the petitioners. Especially is this true because in the present case, the rates charged petitioners were not reduced—they were higher after being finally established than they had been before the stay order—and there is no pending controversy between these petitioners and their ultimtae consumers. In the Muscatine case, the local distributor's rates were reduced and there was a dispute as to the ownership of the fund. Also these petitioners did not increase the rates charged their ultimate consumers as the result of the increased rates imposed on them by reason of the stay.

Thus there were no grounds upon which the court could decide that this case could be distinguished from the Muscatine case. In that case, the Supreme Court of the United States stated: "We are of the opinion that the court below lacked jurisdiction to adjudicate the question of the consumers' rights in the fund in dispute."

That principle is applicable here. These petitioners are local distributing companies, selling natural gas to Iowa communities under franchises held by them from the municipalities they serve. Their rates are subject to regulation under the Iowa law by those municipalities. They and their rates are not subject to the jurisdiction of the Federal Power Commission or to the appellate jurisdiction of the Circuit Court of Appeals. And that court had no power to fix rates—that being a legislative function of the State of Iowa—nor to "adjudicate a matter within the legislative competence of Iowa."

This conclusion cannot be avoided by the assumption made by the lower court that a decrease in the rates finally granted Northern Natural Gas Company would result

in a decrease in the rates these petitioners would have to pay as this assumption is false. The rates paid to Northern by Petitioners were not decreased, they were increased. This is evident from the fact that the lowest rates finally established for Zone 2 which they had to pay were Demand rate $2.04 per MCF per month, Commodity rate $.224 per MCF per month, Overrun rate $.224 per MCF per month as against the prior comparable rates, demand, average of $1.97 per MCF per month, commodity $.221 per MCF per month, overrun $.221 per MCF per month.

It is evident that not only was there no decrease in rates to petitioners but also that there was a substantial increase in rates to them which they absorbed and of which their ultimate consumers got the full benefit as none of the petitioners passed any part of the increase on to them.

Thus the decision in the Muscatine case is applicable. Grounds do not exist for claiming an exception to it.

III.

The decree is in conflict with the prior decisions of the United States Court of Appeals for the Eighth Circuit and with the decisions of other United States Courts of Appeals.

The writ of certiorari should be issued to resolve the conflict between the lower court's decision in this case and its prior decision in *Northern Natural Gas Company v. Federal Power Commission*, 215 F. 2nd 892 and also between its decision and the decision of the United States Court of Appeals for the Tenth Circuit in *Cities Service Gas Company v. Federal Power Commission*, 176 F. 2nd

548 and the decision of the United States Court of Appeals for the Fifth Circuit in *Interstate Oil Company v. Federal Power Commission*, 181 F. 2nd 833.

In its previous decision, the lower court held that local distributors who had not made rate increases to their customers during the period of the stay were entitled to an unconditional order of refund. Although petitioners did not increase rates to consumers during the period of the stay and absorbed the increased amount paid by them to Northern Natural Gas Company during the period of the stay, yet the court failed to abide by its former ruling. The resulting confusion can only be corrected by the Supreme Court of the United States.

In *Cities Service Gas Company v. Federal Power Commission*, 176 F. 2nd 548 the United States Court of Appeals for the Tenth Circuit reached a conclusion directly opposite to that reached by the decree in this case, holding that the Federal Court was without power to adjudicate a controversy between a local distributor of natural gas and its ultimate consumers as to which was entitled to a refund. That court said, in part:

> "It seems to us that if the Muscatine case is to be given force and effect, the conclusion must be that in those cases in which the local distributing companies are engaged in intrastate business only, the Federal Court is without jurisdiction to adjudicate a controversy as to the ownership of the impounded funds between such companies and the ultimate consumers * * *."

To the same effect is the decision by the United States Court of Appeals for the Fifth Circuit in *Interstate Oil Company v. Federal Power Commission*, 181 F. 2nd 833.

IV.

Questions of public importance which are in the public interest to have decided by the Supreme Court of the United States are involved in this case.

As earlier stated, Northern Natural Gas Company has had six applications for rate increases in the last seven years the last of which is now pending. It is not unique in this. All pipeline companies engaged in the transportation, distribution and sale of natural gas in interstate commerce have done likewise. They all have experienced increased costs which require them to obtain increased revenues from their customers.

Every time an application is made for an increased rate by one of the interstate pipelines, the local distributors are faced with a problem. That problem exists whether the local distributor is operating under a state commission or under the respective municipalities in which they hold franchises. The problem is what to do.

In Iowa, it is accentuated by the fact that each municipality controls its natural gas rates.

Under the Natural Gas Act, the interstate pipeline files its application for a rate increase with the Federal Power Commission. On a stated date, this increase goes into effect under bond. Hearings are then held by the Federal Power Commission to determine what part, if any, of the increase the applicant is entitled to. If the applicant is dissatisfied with the rate fixed, it appeals to the appropriate Circuit Court. There it is, by stay order, permitted to collect the rate requested until the final de-

termination of the matter either by that court or by the Supreme Court of the United States.

During all this time, the local distributors are paying the requested rate to the pipeline. In connection with each such application, if the finally established rate is less than that requested, there are two refunds, one of the excess funds collected under the Federal Power Commission's bond, the other of the excess funds collected under the court's stay order.

During all of this period, the local distributors have the problem of their local rates. They know they are going to have to pay a higher rate but they do not know how much. In recent years, there have only been increases in rates charged them for natural gas. There have been no decreases. They are faced also with increased costs of operation. Wages, supplies, construction costs, and the like have steadily advanced in cost.

Petitioners have attempted to solve the problem by themselves paying the increased rate and not attempting to change their local rates with the understanding that the refunds would then belong to them. Other local distributors have attempted different solutions. Many have raised their rates. But the problem is one which affects every pipeline company, every local distributor, every ultimate consumer in the United States.

In Iowa, if the petitioners wanted to raise their local rates to compensate for the increased rates exacted from them, they would have to negotiate new rates and rate schedules with the governing body of every municipality in which they operate. If the final increase were less

than the rate requested by Northern Natural Gas Company, they would have to repay the excess to their consumers and again negotiate a revision of rates and rate schedules. This is impractical and expensive.

Thus it is in the public interest that fair and reasonable rules of uniform and equal application be established by the Supreme Court of the United States. Petitioners are firmly of the opinion that the problem can be simplified by the recognition of the rights of the states over local rates for natural gas and of the principle that Federal control, whether by commission or court, over refunds ends when those funds are delivered to the local distributor, not under the jurisdiction of the Natural Gas Act, subject to the power of the court to hold the fund until known claimants have had the opportunity to assert their claims in the appropriate state tribunal. The assertion of these propositions by the court will end the national chaos presently existing. In doing so, the court will be reiterating the grounds for its decision in the Muscatine case.

V.

The decree deprives the petitioners of their property without due process of law.

By its decree, the United States Court of Appeals for the Eighth Circuit has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court of the United States power of supervision over it. In the absence of federal legislation purporting to confer the power upon it to fix or adjust petitioners' rates, in the presence of direct statutory inhibition upon it under the Natural Gas Act, and

in defiance of the undoubted power of the State of Iowa to fix and determine the rates charged by petitioners to ultimate consumers in Iowa. The Federal Court below has presumed to make local rates for petitioners.

By its action, call it what you may, it has deprived the petitioners of their property without due process of law; it has unwarrantably encroached upon the powers of the sovereign State of Iowa.

The money represented by the refunds in this case is the money of the petitioners. Their consumers paid no part of it. Petitioners did not raise their rates in order to obtain this money from the consumer. If it is returned to petitioners, it does not make them whole as it is returned on the basis of a higher rate than that previously charged them. But whether these conditions existed or not, the lower court did not have jurisdiction to make an order refunding such moneys to ultimate consumers.

The consumers' rights have not been invaded. Petitioners collected from them their legally established rates. When they did so, the money collected became the property of the petitioners. When the petitioners followed their established rates and rate schedules in making collections from their consumers, the funds collected became their property. They cannot be deprived of that property by either legislative or judicial action without violating the due process clause of the constitution. But the lower court has done that by its decree. It is taking from the pockets of the utilities and placing in the pockets of the consumers all of these refunds although all the consumers ever paid were the utilities' legally established

rates which were not increased as the result of the stay order.

Only the states can regulate the rates of local distributors. The Natural Gas Act recognizes this fact when it expressly excepts the local distribution of natural gas and the facilities used for such distribution from its provisions. As written, that act does not usurp the regulatory authority of the states. As was said in the Muscatine case: "That Congress intended to leave intrastate transactions to state regulation is clear, not only from the language of the act, but from the exceptionally explicit legislative record, and from this court's decisions."

Thus, even if a rate reduction to petitioners were involved, which is not the case since a rate increase, not a decrease is involved, Federal Power Commission, in the first place, and the Circuit Court, in the second, are without jurisdiction to regulate the local rates of petitioners or to order a reduction thereof in order to give the ultimate consumers the benefit of any rate reduction ordered by such commission or by such court in rates between interstate wholesalers and local distributors of natural gas.

In Iowa, by statute, its municipalities exercise the rate making power. (Section 379.28, Code of Iowa 1954.) Petitioners operated under rates and rate schedules so established under Iowa law. Consumers paid those rates. The respective rights of these local distributors and their consumers to the refunds must be determined by Iowa law.

The Supreme Court of Iowa in *Pill v. City of Marshalltown*, 241 Iowa 106, 40 N. W. 2nd 53, reviewed the

pertinent Iowa statutes and decisions and held that the power of a municipality to regulate rates and service as delegated to it by statute is legislative and not within the control of the courts; that the City Council of the municipality has a discretion in establishing gas rates with which the courts are powerless to interfere unless it acts oppressively or unreasonably; and that neither the wisdom of the action of the City Council nor the method followed by which it derives its results are subject to attack.

Yet the lower court by its decree is attempting to do indirectly that which it cannot do directly. Admittedly it cannot make rates for the local distribution of natural gas in Iowa. It cannot reach the same result under the guise of the exercise of its general equitable powers.

Petitioners insist that the question of ownership of the refunds is one for the State of Iowa to decide in its courts and under its statutes and decisions and that the decree of the lower court constitutes a gross usurpation of the power and jurisdiction of that state. They further state that whether or not there may be cases in which the lower court in the exercise of its equitable powers may allocate a fund to prevent injustice, such a case does not exist here. It cannot exist when the local distributors do not raise their rates and, on the conclusion of the litigation, are forced to pay rates greater than those previously paid by them.

CONCLUSION

Wherefore, your petitioners pray that a writ of certiorari issue under the seal of this court, directed to the Court of Appeals for the Eighth Circuit, commanding said

court to certify and send to this court a full and complete transcript of the record and of the proceedings of the said circuit court had in the case numbered and entitled on its docket, No. 15,424, *Northern Natural Gas Company, Petitioner, vs. Federal Power Commission, Respondent, Iowa Public Service Company, et al., Interveners,* to the end that this cause may be reviewed and determined by this court as provided for by the statutes of the United States; and that the judgment herein of said circuit court be reversed by this court, and for such further relief as to this court may seem proper.

Dated August 30, 1957.

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APPENDIX A

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Opinion No. 281

IN the Matter of
Northern Natural Gas Company

Docket No. G-2217

Adopted: May 19, 1955
Issued: May 20, 1955

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

In the Matter of
Northern Natural Gas Company

Docket No. G-2217

OPNION NO. 281

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UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Jerome K. Kuykendall, Chairman; Claude L. Draper, Nelson Lee Smith, Seaborn L. Digby, and Frederick Stueck.

In the Matter of
Northern Natural Gas Company

Docket No. G-2217

OPINION NO. 281

OPINION AND ORDER PRESCRIBING RATE ZONES AND RATE DIFFERENTIALS

This matter is before us upon exceptions to and appeals from the Intermediate Decision of the Presiding Examiner as filed herein on November 12, 1954. There is to be decided a single issue presented by the proposals of certain intervening parties that service zones be established on the system of Northern Natural Gas Company (Northern) and that differentials in rates be fixed for service in such zones.

The proceeding arose out of the filing on June 26, 1953, by Northern of proposed revised sheets to its FPC Gas Tariff to provide increases in rates and charges for the sale of natural gas for resale. By order issued on July 24, 1953, pursuant to Section 4 of the Natural Gas Act, the Commission, upon its own motion, suspended and deferred the use of such proposed revised sheets.

Pursuant to Commission order, hearings were held on October 26, 27, and 28, 1953, at which Northern presented evidence purporting to support its proposed increased rates and charges. Thereafter, on January 21, 1954, following conferences among the parties to the proceeding, final agreement was reached by the parties respecting all matters involved and issues presented in the proceeding, excepting the single issue respecting rate zones and rate differentials.

The agreement of the parties was reflected in a statement approved by the Commission by order issued January 28, 1954, which required Northern to file revisions of its FPC Gas Tariff to accord with the approved settlement. This order, as contemplated by the approved settle-

ment, also directed that further hearing be held in this proceeding respecting service zones and differentials in rates.

Pursuant to such order issued January 28, 1954, hearings on the issue now before us were held commencing on March 22, 1954, and, with necessary recesses thereof, concluding on June 24, 1954. A large number of parties were permitted to intervene and participate in the proceedings. Their identity is disclosed at a further point herein.

The Presiding Examiner filed a Decision in this matter on November 12, 1954, which was issued on November 18, 1954. Thereafter, pursuant to Section 1.31 of the Rules of the Commission, Central Electric & Gas Company (Central) Council Bluffs Gas Company (Council Bluffs) and the Metropolitan Utilities District of Omaha (M. U. D.), interveners, acting jointly and Commission Staff Counsel, filed exceptions to and appeals from the Decision. Oral argument on these exceptions and appeals was heard by the Commission on February 17, 1955.

It is the position of Central, Council Bluffs, and M.U.D.,[1] that Northern's present tariff, which provides uniform system-wide rates to all resale customers, excepting the so-called Argus System,[2] is unduly discriminatory as to them and preferential as to others of Northern's customers; and that the only fair, practical, and

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1 This coalition of Council Bluffs, Central, and M. U. D. is hereinafter sometimes referred to as the "Proponents."

2 The area often referred to as the Argus system comprises facilities of Northern in and near the Hugoton Field used for the sale of gas to communities in this area.

equitable means for the elimination of the unduly discriminatory rates is the adoption of service zones and zone rates differentials. The Staff also is of the opinion that Northern's tariff is unduly discriminatory and preferential, and that such discrimination and preference should be eliminated by the fixing of service or rate zones and differentials in rates. The Proponents and the Staff, however, have different views as to the proper boundaries for such zones, as well as the appropriate differentials in rates between zones.

All other interveners participating in the proceeding and Northern are opposed to the establishment of zones. These interveners, the State of Minnesota, City of Minneapolis, City of St. Paul, Northern States Power Company, Minneapolis Gas Company, Minnesota Valley Natural Gas Company, Western States Utilities Company, Iowa Public Service Company and Iowa Electric Light & Power Company[3] joined forces to present evidence and argument opposed to the establishment of zones on Northern's system, and rate differentials.

In the Decision filed November 12, 1954, the Presiding Examiner found and concluded, among other things that:

"(18) Northern's current uniform system-wide rates, which became effective December 27, 1953, have not been shown to be so unjust, unreasonable, unduly discriminatory or preferential as to constitute a violation of Section 5 (a) of the Natural Gas Act.

"(19) The public interest does not now require the establishment of service zones or zone rates upon

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3 Sometimes hereinafter collectively referred to as the "Opponents."

> the interstate natural gas system of Northern Natural Gas Company."

Although having thus stated a negative finding and conclusion as to the main question in the case, the Presiding Examiner expressed in the Decision his findings and conclusions as to other questions which he did not properly reach in view of his recommended disposition of the basic issue. Naturally, since these extraneous expressions of opinion—having the nature of dicta—are opposed to their contentions, the Proponents and the Staff appeal therefrom as well as from the findings and conclusions upon the basic issue.

A proposal to establish zones and rate differentials on Northern's system was previously presented by Council Bluffs in earlier proceedings involving rates of Northern at Docket Nos. G-1382 et al. In our Opinion No. 228 issued June 11, 1952, in those proceedings it was stated (page 31, mimeo. ed.):

> "Zone Rates: Northern at present has system-wide rates with the exception of its sales in the Hugoton area * * *. Council Bluffs advocated zone rates for Northern's sales. In support of its contention, Council Bluffs presented detailed studies of proposed zones, with cost of service and allocation of costs by zones and proposed specific zone rates. However, on a system as complex as Northern's the determination of proper zone rates, to our mind, requires more thorough and exhaustive study. Other methods of allocating costs between zones might be more reliable than the pipe-line mileage method utilized by Council Bluffs. Moreover, the delineation of zones requires scrupulous care if such zones are not to be arbitrary or discriminatory. Council Bluffs' witness, who prepared these studies conceded, upon cross ex-

amination, that his use of state lines as zone boundaries was arbitrary and that other boundaries might reasonably be fixed. For the foregoing reasons, and from our examination of the record, we do not believe that there is sufficient evidence before us to determine at this time whether zone rates for Northern's system are in fact proper, and if so, what such zones and such rates should be. There is now pending a proceeding upon a proposed rate increase by Northern in Docket No. G-1881 and we think it's appropriate that the problem of zone rates be explored in that proceeding.'"[4]

Since only limited hearings were held in the proceedings at Docket No. G-1881 mentioned in the above quotation, an opportunity was not there afforded to further develop the matter of zoning. At the first opportunity thereafter presented, being this instant proceeding, Council Bluffs again raised in its petition for leave to intervene the issue respecting the establishment of zones and rate differentials, as did Central. Thereafter, M. U. D. joined with the other two interveners in urging the fixing of zones and rate differentials, and in the joint presentation of evidence in support of this position.

Extensive evidence was presented by the parties favoring the establishment of zones and rate differentials—as well as by those opposed thereto. The Staff of the Commission, although it took no position during the hear-

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[4] Upon review the United States Court of Appeals cited this part of the opinion with approval. **Northern Natural Gas Co. v. Federal Power Commission**, 206 F. (2) 690, 712, affirming FPC. Op. No. 228 in pertinent part and reversing in part; cert. denied 346 U. S. 922.

ing in the matter,[5] presented evidence designed to aid in the resolution of this issue. The record made in the sixteen days of hearing devoted to this single question includes 46 exhibits, many of which are quite voluminous, and over 2,000 pages of testimony. There is ample evidence before us at this time upon which to reach a decision, unlike the inadequate state in which we found the record in earlier proceedings where the zoning question was first broached. (See F.P.C. Opinion No. 228, supra, page 31.)

Northern's pipe-line system is about 800 miles in length, extending from the Panhandle Field in Texas and Hugoton Field in Kansas and Oklahoma to a point near the Twin Cities of St. Paul and Minneapolis. In addition to the gas purchased from producers in these fields, Northern also takes delivery of substantial volumes of gas near Wasson, Texas, from Permian Basin Pipeline Company (Permian), a subsidiary of Northern.[6] Permian, in turn, purchases natural gas in the Permian Basin Area in west Texas and eastern New Mexico—some 400 miles south of the other fields supplying Northern. Thus, Northern's system is, in effect, extended to a distance of about 1,200 miles.

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5 At the outset of the hearing on this particular phase of the proceedings, and on several occasions thereafter, Staff Counsel stated that the Staff, as such, would take no position during the hearing either in favor of or in opposition to the establishment of zones on Northern's system. It was stated to be the Staff's purpose in the hearing to secure the development of a comprehensive record upon which ultimate decision could be made by the Commission; first, as to whether zones should be established; and, second, in the event it be found that they should be, an appropriate basis for fixing zones and rate differentials. The Staff first announced its position favoring zones in the initial brief filed herein.

6 Northern owns approximately 83 per cent of Permian Basin Pipeline Company.

Natural gas transported through this system is sold to other utilities at points in Kansas, Nebraska, Iowa, South Dakota and Minnesota for resale to consumers in these states. Through its so-called Peoples Natural Gas Division, Northern also sells directly to consumers in each of these states. Excepting those sales made in and adjacent to the Hugoton Field, in Kansas, the rates charged by Northern for Jurisdictional sales have historically been uniformly available and applicable. And, in proposing the increased rates which initially were the subject of this proceeding, Northern also designed rates to be applied uniformly to all sales for resale in Kansas, Nebraska, Iowa, South Dakota, and Minnesota.

At the time of the hearing in this matter, Northern was serving one distributing company in the State of Kansas. Deliveries to this customer, the Kansas Power & Light Company, are made at 15 separate points requiring transmission through Northern's facilities of distances ranging from 179 to 322 miles from the source of gas supply.[7] These sales in Kansas, however, represented only about 0.35 per cent of the total sales for resale estimated for the year 1954.

Northern, at the time of the hearing, also served twenty-six other utilities at 126 delivery points in the States of Nebraska, Iowa, South Dakota, and Minnesota.

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7 These mileage computations are based solely on miles of transportation through the facilities of Northern only, and do not include transportation by or for the account of Permian Basin Pipeline Company. In computing the mileage to the several points of delivery there was first determined the weighted average transmission miles of haul from the several sources of gas supply to a common point on Northern's transmission system. This was determined to be at Northern's Bushton (Kansas) Compressor Station, which is the last point of input into the system.

These sales constituted 99.65 per cent of Northern's total estimated jurisdictional sales in 1954. Deliveries in these states are made at points on Northern's system ranging from 390 to 803 miles from the source of gas supply. While, as noted, there are 126 of such delivery points, sales at the 8 points shown below represented over 71 per cent of Northern's total estimated jurisdictional sales in 1954.

Delivery Point	Estimated Annual Sales 1954 (Mcf)	Percentage of Total Annual Jurisdictional Sales	Percentage Load Factor of Sales	Weighted Average Miles of Haul—Transmission System
Lincoln	10,866,200	4.63	76.19	447.62
Omaha	26,345,000	11.23	78.27	480.61
Council Bluffs	6,053,600	2.58	77.02	483.96
Sioux City	9,826,400	4.19	75.87	560.46
Des Moines	25,352,400	10.81	81.75	625.91
Sioux Falls	7,358,800	3.14	81.10	642.92
Minneapolis	55,013,000	23.45	70.30	795.59
St. Paul	25,922,200	11.05	83.27	803.37
Total	166,737,600	71.08	76.41 Ave.	666.65 Ave.
Jurisdictional Sales System Total	234,588,200	100.00	76.38 Ave.	662.00 Ave.

Having in view the facts concerning the mileage of transmission through Northern's facilities required to effect deliveries to these and other points of sales, and considering particularly the fact that the cost of transmission represented 55 per cent of Northern's total estimated cost of service in 1954, as agreed upon in the ap-

proved settlement, the Proponents of zoning contend that Northern's present uniform, system-wide rate practice requires communities situated nearer the source of gas supply "to subsidize" those communities located more distant from the source of supply. This, it is argued, subjects the "subsidizing communities" to economic disadvantage and is preferential to others—and is undeniably undue discrimination forbidden by Sections 4 and 5 of the Natural Gas Act.

While conceding that factors other than distance of required transmission should be considered, such as load distribution, volumes of gas sold, and load factor of sales, the Staff contends that the distance that gas is required to be transported to the points of deliveries is a primary and important cause for the incurrence of transmission costs. Giving consideration to these several factors as related to the system of Northern, it is the position of the Staff that the application of uniform rates and charges throughout the large area served by Northern exclusive of the so-called Argus System, subjects some of Northern's customers to undue discrimination and grants preference to others. This contention of the Staff is primarily based upon the facts that markets closer to the source of gas supply involve lesser transportation expense than more remote markets, and, therefore, are entitled to a lesser rate—unless it be shown that factors other than distance offset the differences in transportation mileage and related costs. The Staff contends that there are no such offsetting factors in this case.

The Proponents of zoning likewise contend that where cost of transportation is a dominant factor as it is here

distance is a controlling factor in the absence of other countervailing factors. And, they further contend, there are no such countervailing factors in this case.

As opposed to these arguments, the parties opposed to zoning, including Northern, contend that there should be no change in Northern's long-continued practice of maintaining uniform rates throughout its system, excepting the Argus area, and of "rolling-in" in such uniform rates additional costs as they were incurred. It is said that this practice has been previously "approved and accepted" by the Commission, and that no good reasons have been herein shown for departing from this practice. In furtherance of this point of argument, the Opponents go to great lengths to demonstrate that the large volume of gas distributed on Northern's system, increasing through the years, has benefited all of Northern's customers through lowered transmission costs. They also urge that the large volume sales made in the upper reaches of Northern's system have benefited customers closer to the source of gas supply, in that such latter customers enjoy a lower unit transmission cost than they otherwise would have without benefit of such sales on the system. From these and similar arguments, the Opponents conclude that by the uniform rate all of Northern's customers share "equitably" in the cost, and, that, therefore, the uniform rate should be continued.

The parties opposing zoning, including Northern, contend also that an increase in rates to some of the distributors occasioned by the establishment of zone rate differentials "will" result in the loss of interruptible industrial sales, and "that the loss of such customers will

of necessity cause a raise in the demand charge and thereby all of the firm customers on Northern's system will be injured." The loss of sales, it is said, will result because such an increase in rates will price natural gas out of the competitive market, at least so far as some present industrial consumers are concerned.

Finally, we note the contention of these parties that the proposal to establish zones on this system is untimely and premature because: (1) Northern has pending before this Commission an application for authorization to import gas from Canada as an additional source of supply; (2) Northern, pursuant to limited authorization of the Commission, is exploring the possibility of developing a storage area at a point near its system; and (3) Northern has pending before the Commission applications for authorizations permitting the extension of its system into new markets in Minnesota, Wisconsin, and South Dakota. The Opponents further contend that: "Any one of the projects upon completion would certainly require another zone study."

We, of course, have not attempted to recite all the varied arguments advanced by the opposing parties in support of their positions, but we have referred to those which are basic. Further allusion to the variations thereof at this point would not aid in our discussion, nor in an understanding thereof.

Attacking the problem from the rear, the Presiding Examiner first sought to determine which, if any, of the several zoning proposals submitted afforded the most feasible and least discriminatory method of establishing zones for service and rate determination purposes. Hav-

ing determined that none of the proposals presented was satisfactory, and that his suggested alternative zoning was wholly satisfactory, the Decision progresses to the point where it is found and concluded that:

> "It is impossible to find under the circumstances, and in view of probable early changes in both markets and sources of supply of Northern, that the present uniform system of rates on the system of Northern is unjust, unreasonable, unduly discriminatory or preferential."

And the Examiner goes on to say that:

> "While it is not believed that the time is now ripe for zoning of Northern's system, it is entirely possible and probable that at some time in the future zoning of the Northern system will be desirable and have the effect at that time of being less discriminatory and preferential than a uniform rates structure for the whole system."

The initial question to be decided, however, is not whether any of the zoning proposals are feasible, but, rather, whether the present rate structure of Northern is unduly discriminatory or preferential. If the finding is in the negative, as was the Examiner's, then it becomes immaterial whether the proposals as to zone boundaries are proper or not.

To clear the approach to a consideration of this basic question, we would make it clear that we consider the proposals of zoning neither untimely nor premature—if it be concluded that the existing rate practice of Northern is unduly discriminatory or preferential, and, therefore, contrary to the provisions of the Natural Gas Act. The purposes of the Act cannot be thwarted simply because

at some indefinite time in the future the present scheme of operations of the system may undergo a change by the attachment of new sources of supply, or the extension to new market areas, or the development of gas storage facilities. To hold that effectuation of a primary purpose of the Congress in the enactment of this legislation is dependent upon the fixedness of the operations of the subject company and the improbability of a change in its operations or extension of its facilities would be unreasonable.

The matter before us involves that which is frequently termed a "discrimination case" as distinguished from that which is usually called a "rate case." As so designated, the latter type of case generally involves a determination as to the reasonableness of rates in the sense of whether they are adequate and non-confiscatory or whether they are excessive and unjust. Here we are not concerned with reasonableness in this sense, but rather as to whether rates—otherwise presumed to be reasonable—are unduly discriminatory or preferential. This phase of the proceeding is founded primarily upon subsection (b) of Section 4 of the Act which provides as follows:

> "(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service."

These prohibitions against undue preference or advantage, undue prejudice or disadvantage, and unreasonable differences in rates, charges, service, or facilities are implemented by subsection (a) of Section 5 of the Act.[8]

The Natural Gas Act does not attempt to define unlawful discrimination or preference with mathematical precision. Instead it is left to the Commission to primarily decide whether from facts, disputed or undisputed, in a given case preference or discrimination exists;[9] and whether it is of such a nature as to be unlawful within the contemplation of the statute. As the Commission has heretofore found, discrimination or preference may be exhibited in various forms.[10]

The matter now before us involves a determination as to whether unlawful discrimination or preference is created by the exaction from all customers on a transmission system of identical, uniform rates when the points

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8 The fact that this proceeding was initiated under the primary authority of Section 4 (e) of the act is immaterial. This section provides, in pertinent part, that:

"* * * after full hearings, either completed before or after the rate, charge classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective."

This refers, of course, to a proceeding initiated under authority of Section 5 (a). Thus, the Commission is empowered to grant the relief here requested—if it is found appropriate and proper so to do. **Ayshire Collieries Corp., et al., v. United States, et al.**, 335 U. S. 573, 581-583.

9 See **United States, et al., v. Chicago Heights Trucking Co., et al.**, 310 U. S. 344, 352-353; **United States v. Louisville & Nashville R. Co.**, 235 U. S. 314, 320.

10 E. G., see Opinion No. 225, **In the Matters of Atlantic Seaboard Corp., et al.**, pages 29-32 (mimeo. ed.); **In the Matter of Transcontinental Gas Pipe Line Corp.**, 9 F. P. C. 32, 53-54, 63; **In the Matter of Michigan-Wisconsin Pipe Line Co., et al.**, 9 F. P. C. 127, 135-136, 150; **In the Matter of San Juan Pipe Line Co., et al.**, 9 F. P. C. 170, 185, 194.

of delivery to the several customers are as much as 600 miles apart. We find, under the circumstances of this case, that Northern's uniformly applicable rates and charges are unduly discriminatory as to some of its customers and unlawfully preferential as to others.

It is simple economic fact that the delivery cost of natural gas increases in close proportion to the length of the transmission line of any given size. From this Proponents and the Staff reason that it is unreasonable, unduly discriminatory and preferential to charge customers located nearer to the source of gas supply with the same burden of transmission costs as are assessed to customers situated 100, 200, or even 600 miles farther from the source. The charging of uniform rates under such circumstances, it is said, saddles the customers requiring the lesser transportation with costs that are incurred solely for the benefit of customers farther removed from the source of gas—and requiring consequent longer haul. Without more, it would seem that these proponents of zoning for Northern's system have made their case.

The parties opposed to zoning contend, however, that the factor of distance of transmission is offset by the fact that sales made in Minnesota—the most remote state served by Northern—have benefited customers below Minnesota, in that such customers enjoy a lower unit transmission cost than they otherwise would have without the benefit of such sales on the system. This is but another way of stating the generality that for any given length of pipe line, with any given load factor, the larger the line the lower the unit delivery cost of gas. This results from the fact, as shown by the record here—as well as

elsewhere,[11] that, while the cost increases approximately in proportion with the diameter, the capacity increases more than the area, so that the capacity of a 24-inch line, for example, is about three times that of a 16-inch line.

We, too, are inclined to the opinion that sales in Minnesota benefit the customers elsewhere on Northern's system by contributing to the large volume of gas handled on this system and the lowering of the unit cost of transmission. At the time of the hearing herein, it was estimated that jurisdictional sales in Minnesota in 1954 would total 104,574,000 Mcf, which was 44.58 per cent of the total of such sales. However, it would appear that jurisdictional sales in the other states served by Northern, estimated to aggregate 130,014,200 Mcf in 1954 would make an equal or greater contribution to the lowered cost of transmission—and to Minnesota customers.

In a further effort to develop this theory and to show that customers in the areas of Northern's system are enjoying a lower cost as a result of the sales made in the farther areas, the so-called Opponents introduced in evidence a laboriously prepared study which purports to reflect the design and costs of constructing and operating a theoretical pipe-line system to serve only those customers in Nebraska, Iowa, and South Dakota. The fundamental purpose of this study, it is said, "was to prove that had any zone under consideration not been served along with the balance of the service area, its service costs would have been higher than they actually are under Northern's presently used uniform rate system." On

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11 Docket No. G-580, Natural Gas Investigation, Smith-Wimberly Report, page 240.

another occasion, when confronted with similar evidence the Commission said:[12]

> "For the most part the assumptions made either do not square with realities or are patently unreasonable as applied to properties and operating conditions such as those concerned."

The same thing could be said of the similar studies in this case.

In any event, it would seem that the studies prove too much. The single study offered for the record by the group of Opponents purports to show the cost benefits derived by customers outside of Minnesota because of the lowered unit transmission cost resulting from the combined jurisdictional sales in the entire system. This study purports to show that sales from the theoretical system serving only Nebraska, Iowa, and South Dakota would have cost customers in these states 1.57 cents per Mcf more in 1951 and 1.442 cents per Mcf more in 1952 than the actual average cost in these years under Northern's uniform system rates. However, it was developed on the record that the witness who prepared this study had made a similar study of a theoretical line to serve only the State of Minnesota. The latter study indicates that the Minnesota customers, if served by separate facilities, would have paid 6.2 cents more per Mcf in 1951 and 5.483 cents more per Mcf in 1952 than the actual average cost in these years under Northern's uniform system rates. Thus, even under this approach of the Opponents, which we do not accept or approve, it would appear that the

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12 In the Matter of Canadian River Gas Company, et al., 3 F. P. C. 32, 62; aff'd, 324 U. S. 581.

Minnesota customers are the prime beneficiaries under the uniform rate practice of Northern.

As a part of this consideration of the relative contributions made by different markets on the system to the cost of transmission, it is important to consider also the distribution of the load on the systems. As shown hereinbefore, eight municipal areas account for slightly more than 71 per cent of the total jurisdictional sales estimated for 1954, supra, page 9. As will also be noted, the miles of transportation required to effect the deliveries at these eight points range from 448 to 803. The following tabulation gives a complete breakdown by mileage of the total jurisdictional sales:

Distance in Miles From Source of Gas Supply	Estimated Jurisdictional Sales for Year 1954 (Mcf)	Percentage of Total Jurisdictional Sales
0-400	1,826,400	0.778
401-500	47,520,800	20.257
501-600	20,025,500	8.537
601-700	61,954,900	26.410
701-803	103,260,600	44.018
Totals	234,588,200	100.000

It is of further significance to note that more than 50 per cent of the estimated jurisdictional sales for the year 1954 require transportation through Northern's facilities for distances of less than 650 miles. Considering the data shown in the above tabulation, as well as the more detailed evidence in the record, we find that there is no such concentration of sales in a single area of the system as would countervail against the arguments of the Proponents and the Staff that the distance of transmis-

sion—the mileage of haul—is the primary and controlling factor in the determination of the basic issue here. While it is true that 37.5 per cent of the total estimated jurisdictional sales for 1954 were made at or near the terminus of Northern's system, the distribution of the remainder of these sales along the system is such as to foreclose a finding that sales at the farthest points of the system are so predominate as to be of controlling consideration rather than the distance factor.

We take particular note, too, of the fact that the annual load factor of estimated 1954 sales in Minnesota is lower than the system average for jurisdictional sales and the lowest also of any state served by Northern. The matter of load factor is of importance because for any given length and size of transmission line, delivery cost per Mcf increases as the load factor at which the line is operated decreases.[13] Thus, as hereinbefore noted, while the large volume sales in Minnesota undoubtedly contribute to a lesser unit cost for transmission, the lower load factor of such sales has a converse tendency.

During its long administration of the Interstate Commerce Act, the Interstate Commerce Commission has often had occasion to pass upon matters similar to those here involved. While the Interstate Commerce Commission in its regulation of the railroad and motor carriers of the nation must often consider other factors which are generally foreign to the natural-gas industry, in pro-

13 This generality simply gives expression to the mathematical fact that more complete utilization of any given capital facilities involving fixed costs will result in declining unit costs. Docket No. G-580, **National Gas Investigation, Smith-Wimberly Report**, page 260; **Hamilton, Cost as a Standard for Price**, 4 Law and Cont. Prob. 321, 330.

ceedings involving haul and place relationships that Commission gives principal consideration to the factors of distance and competition between carriers. The Commission's regard of these factors in this type of proceedings has been well stated as follows:[14]

> "While there is no easy index of rate-paying ability, cost of service obtrudes itself in an obvious and inescapable form through the element of distance. The length of the haul is a physical fact which provides an objective measure of the amount of service rendered; and although cost does not vary in direct proportion to distance (any more than ability to pay varies in direct proportion to the value of commodities), even a rough application of the distance principle tends to improve the most questionable rate relationships, and reasonable refinements can readily be made where they are needed. Accordingly, the element of distance as an index of the cost and worth of transportation service appears to have commended itself to the Commission as a leading consideration for reasons of its easy ascertainment and popular appeal as a fair standard, as well as because of the more substantial economic grounds which support its recognition. Despite many evidences of the Commission's inclination to observe that cost is only one of a number of significant factors in rate-making, it does not appear that in the adjustment of charges between hauls any other criterion has been set up as a positive guide in the processes of rate control.
>
> "Broadly regarded, then, the vast number of rate proceedings involving haul and place relationships lend themselves to a fairly uniform pattern of analysis. The principal factors to be considered have generally been distance and competition between car

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14 Vol. III-B, **Sharfman, The Interstate Commerce Commission,** pages 541-542.

riers). The basis of complaint has commonly consisted of an apparent failure to adjust charges in sufficiently close conformity to the length of the haul or of some related cost element, the extenuating circumstances urged as justification of rate adjustments which disregard distance have commonly consisted in the exigencies of competition or of some related condition involving the need of attracting traffic. As already noted, these considerations—distance and competition—have operated on different levels; the one as a positive standard to which closer conformity may be required; the other as a plausible ground for permitting departure from this standard."

To a similar effect, we note the statements on this subject by another authority, which has been cited to us by the Opponents:[15]

> "The (Interstate Commerce) Commission has always recognized distance, however, as a most important consideration in rate making and has said that, as a general rule, other things being equal, distance should be a controlling factor, and rates between distant points should exceed those between points less distant. Distance, however, has never been regarded as the sole consideration. As said by Commissioner Prouty 'Rates cannot be made with a yard stick.' Where, therefore other circumstances are present which outweigh the importance of the length of the haul, either as affecting the cost or the value of the service, it has held that distance may properly be disregarded."

Our position in this proceeding is thus in general accord with the position taken by the Interstate Commerce Commission in similar matters which has so often been approved in the courts.

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15 I. Drinker Interstate Commerce Act, Sec. 58 (1909).

As previously stated, it is a simple economic fact that the delivery cost of natural gas increases in close proportion to the length of the transmission line of any given size. Therefore, unless other circumstances are present which outweigh the importance of the length of transmission required to effect delivery, the distance factor is the prime determinant of the cost of rendering service. Since in our view of this record there are no such circumstances present to counter-balance the distance factor, we conclude that the distance of transmission required to effect deliveries at the various points of sale by Northern reflects with reasonable accuracy the relative cost of providing service to its customers. We further find and conclude that Northern's present practice of demanding and collecting uniform rates throughout the length and breadth of its area of service for the sale of natural gas for resale is unjust, unreasonable, unduly discriminatory, and preferential. This practice results in the shifting of transmission cost from those whose service requires its incurrence by reason of the greater transportation distances to others who are not responsible for such cost—and who are not benefited correspondingly.

Having found and concluded that Northern's present uniform rate practice is unlawfully discriminatory and preferential, there is to be determined the manner in which the discrimination and preference may be most properly eliminated. In theory, the ideal, non-discriminatory, and non-preferential rate structure would be one designed to assess each point of sale and delivery with the total of the various cost components incurred in the rendering of service to each point. But any attempt to

arrive at such perfection would be not only delusory,[16] but also impracticable and infeasible from both the management and regulatory point of view. In the circumstances of this case, the only practical and reasonable approach to an equitable solution is the establishment of service zones—with rate differentials—as urged by the Proponents of zoning and the Staff.

The Proponents of zoning recommend the establishment of two zones on Northern's system, exclusive of the so-called Argus System which is sometimes referred to as a zone. The boundary lines, under this recommendation would be established at the suction side of the Oakland (Iowa) Compressor Station on the east branch of the system and the suction side of the Hooper (Nebraska) Compressor Station on the west branch.

The Staff witness presented in evidence four different possibilities of zoning for Northern's system.[17] These several suggested methods of establishing zones may be summarily described as follows:

> Proposal A — Boundary lines between Zones 1 and 2 to be established at the Bushton (Kansas) Compressor Station. Boundary lines between Zones 2 and 3 to be established at the Hooper Compressor Station on the west branch and at the Oakland Compressor Station on the east branch of the system.
>
> Proposal B—Boundary lines between Zones 1 and 2 to be established at the Kansas-Oklahoma border.

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16 **Colorado Interstate Gas Company v. Federal Power Commission, et al., 324 U. S. 581, 589; Hamilton, Cost as a Standard of Price, supra; Op. No. 225, In the Matter of the Atlantic Seaboard Corporation, et al., pp. 17-19 (mimeo. ed.).**

17 **As noted hereinbefore, the Staff, as such, did not take a position on the zoning issue during the course of the hearing (Fn. 5, supra).**

Zones 2 and 3 to be separated by a line running through the Beatrice (Nebraska) Compressor Station. Zones 3 and 4 to be separated by dividing lines at the Paullina (Iowa) Compressor Station on the west branch and the Ogden (Iowa) Compressor Station on the east branch.

Proposal C—Under this plan each of the states through which Northern's system extends would constitute a separate zone as follows: Zone 1—Oklahoma, Zone 2—Kansas, Zone 3—Nebraska, Zone 4—Iowa, Zone 5—South Dakota, and Zone 6—Minnesota.

Proposal C Modified—A modification of Proposal C to establish additional sub-zones in the states of Nebraska and Iowa having boundary lines equidistant from the source of gas supply.

The Staff, as such, recommends the so-called Proposal B, as briefly described above. In expressing his individual opinion, as distinguished from the collective opinion of the Staff, the staff witness stated the so-called Proposal C modified to be most suitable for Northern's system.

The Presiding Examiner found and concluded that:

"(12) The most feasible method of zoning the system of Northern, as it existed prior to construction of the facilities authorized in Docket No. G-2063, would be obtained by the creation of an A or Argus Zone, extending from the southern end of Northern's system to the Bushton compressor station and a division of the remainder of the system into two zones at a point far enough north of the Ogden, Iowa, and Paullina, Nebraska, compressor stations to fix (without question) in the southernmost of said zones the delivery points from the main line to the Waterloo-Dubuque and Boone-Marshalltown laterals connected to the Ogden station and the Sioux Falls lateral connected to the Paullina station."

Both the Proponents and the Staff have taken exception to this finding of the Examiner, each urging approval of the particular zoning proposal recommended by them.

After detailed consideration of the record, we have concluded that none of the zoning plans presented by the Proponents and the Staff or the modified plan which the Examiner finds most feasible are appropriate and the acceptable. While each might as claimed tend to eliminate or reduce the discriminations and preferences existing under the present rates of Northern, the facts are clear that other inequities would be created by the establishment of zones according to any of these plans.

Under each of these plans, including that found most proper by the Decision, determination of the zone in which a particular sale is made would be fixed by the point on the main line from which the lateral line enabling such sales takes off. All of Northern's sales of gas for resale are effected at the city gates of the communities served. In most instances these sales are made at the terminii of lateral lines branching from the main line transmission facilities. Thus, the total distance of transmission to each point of delivery is represented by the aggregate of the mileage of transmission through both the main line and the lateral line serving each point of sale. As a result, as is elaborately pointed out by the Opponents, under each of these methods of zoning the total mileage of transmission to certain points in zones closer to the source of supply is greater than the mileage to other points of sale in zones farther removed from the source. Under each of the plans considered, including the Examiner's, deliveries to certain points requiring the

greater mileage of transmission would be made at the lesser rate.

The foregoing is sufficient in our view to condemn each of these methods of zoning. Therefore, it would serve no useful purpose to relate in exhaustive detail other infirmities which we find, but brief additional comment would be illustrative. The zoning proposed by the Proponents would result in a wholly disproportionate division of the principal market territory. Under this plan Zone 1 sales would represent only about 22 per cent of the total jurisdictional business, whereas approximately 78 per cent of these sales would be included in Zone 2. Moreover, under this plan, Zone 1 sales would assume a relatively small and disproportionate portion of the costs associated with the hundreds of miles of lateral lines on the system. These same points of criticisms are also appropriate for the Staff's so-called Proposal A, which is substantially similar to the plan of the Proponents excepting that an additional zone is proposed south of the Bushton station.

The establishing of a separate zone for each state, as contemplated in the Staff's Proposal C, is a method which has been employed by other natural-gas companies. However, it is wholly inappropriate and would be inequitable on Northern's system, particularly because of the geographical relationship of the facilities to the boundary between the States of Nebraska and Iowa. Staff's Proposal C Modified is also unsatisfactory, not only for reasons hereinbefore stated, but also because it would provide for the establishment of too many zones on this system, particularly in the principal market area which

is about 400 miles in length and about 300 miles between the westernmost and the easternmost points of sales. We believe that zones should include as large an area of service as may be consistent with equitable treatment to all customers. Furthermore, this plan more than any other suggested would be responsive to any change of markets or facilities so as to necessitate possibly the establishment of other zones or sub-zones.

Considering the foregoing, and all other facts of record, it is our opinion that the most appropriate and practicable method would be the establishment of three zones on Northern's system which zone bounderies as depicted on the map following this page.[18] (Illustration in this instance is more desirable—and more effective—than description.) This plan, in our view, provides the most effective and equitable basis for eliminating the present unlawful discrimination and preference.

(Here is attached a System Map showing boundaries of rate zones prescribed by Federal Power Commission. Opinion No. 281.)

As noted previously, the Bushton Compressor Station is the last point of input of gas into the mainline facilities. Under this plan, the service area north of the Bushton station, wherein more than 99 per cent of the jurisdictional sales are made, is divided into three zones which are as nearly equal as they can reasonably be so far as transmission distances are involved. Zone 1 em-

18 These three zones encompass the whole of Northern's system north of the Oklahoma-Kansas boundary, which is the area in which all of its sales are made. It would seem appropriate also to designate the area south of the Oklahoma-Kansas line where Northern has facilities as "Zone A."

braces all sales requiring transmission to the point of delivery, including that made through lateral lines, for a distance of 191.0 miles beyond the Bushton station. Sales made at points south of the Bushton station, including sales made in the so-called Argus System, also fall within Zone 1. All sales made on the west leg of the system requiring transmission up to a distance of 190.43 miles beyond the Zone 1 northern boundary and all sales made on the east leg of the system requiring transmission up to a distance of 190.15 miles beyond the Zone 1 boundary fall within Zone 2. Sales falling in Zone 3 require transmission for a maximum distance of 180.8 miles on the west leg and 183.0 miles on the east leg beyond the northern boundary of Zone 2. As estimated for the year 1954, jurisdictional sales in Zone 1 would amount to 2,508,100 Mcf, or 1.07 per cent of the total of such sales, 103,620,800 Mcf or 44.17 per cent in Zone 2, and 128,459,300 Mcf or 54.76 per cent in Zone 3.

Under the procedures advocated by the Proponents of zoning for distributing the cost of service to the zones recommended by them, all costs except transmission costs were allocated on a system-wide basis in the manner prescribed by the Commission in its Opinion No. 228, issued in an earlier proceeding involving increased rates of Northern, and used also in arriving at the settlement of other issues in this instant proceeding as heretofore mentioned. Costs associated with the operation of the transmission main line facilities in Proponents proposed Zone 1 were likewise allocated by them to all customers excepting those in the Argus System, on a system-wide basis, on the theory that these facilities are used for serving all customers. Costs associated with the branch or lat

eral lines located in that Zone 1 were assigned solely to the Zone 1 customers. Similarly, all costs associated with transmission plant located in their proposed Zone 2 were assigned by the Proponents solely to that zone, as they are not considered to be used in any way to provide service to Zone 1.

The Staff in distributing the total cost of service to the several zones, first determined the average weighted transmission miles required to haul purchased and produced gas, as estimated for the year 1954, from the various sources to a common point on the system, which was determined to be the Bushton Compressor Station, the last point of input. The number of transmission miles from the source of supply to each sales delivery point was then determined. Transmission demand miles were computed by multiplying the mileage thus obtained for each delivery point by the three-day system peak average sales at each such point. Transmission commodity miles were computed by the multiplying of the mileage to each delivery point by the annual sales made at that point. The data thus obtained was then grouped by zones and by classes of service.

Under the Staff's procedure, the unit cost of service on a system-wide basis was then determined for each function and allocated to zones and classes of service as follows: Production costs were allocated to all sales in proportion to the volume of annual sales; transmission costs were allocated by the computed demand and commodity Mcf miles; distribution and customers' accounting and collecting costs were assigned to zones according to the number of sales delivery points; and sales promotion expense

was allocated to zones in accordance with estimated annual volume of sales. Drilling and pumping sales were assigned transmission costs by Mcf-miles based upon the average distance of groups of such sales from the supply source.

We do not believe it either sound or reasonable to allocate costs in part on a system-wide basis and in part on the basis of a segregation of certain properties as the Proponents have done. For the purposes of this case wherein we are attempting to arrive at a sound and equitable basis for establishing for the first time a differential in rates in separated areas of a system which has not heretofore had zone rates, we find the theory of the cost allocation procedure advocated by the Staff to be particularly appropriate. We further find, however, for the reasons stated below that certain modifications should be made to the precise manner in which it was applied by the Staff in this case.

The previously mentioned statement of settlement in this proceeding, which was approved by our order issued January 28, 1954, provided, among other things, as follows:

"SECTION VII

"Further Proceedings

"It is agreed that this settlement will dispose of all matters involved and issues presented in this proceeding, excepting the single issue respecting zones of service and differentials in rates between zones. It is further agreed that further hearings herein respecting such issue shall be had at the earliest practicable date and the cost of service hereinbefore se

forth and agreed upon for the purposes of this settlement shall be used to the extent that cost of service is involved.

"For the purposes of this settlement it is further agreed that the decision of the Commission respecting such issue of service zones and rates differentials, if it requires a change in the revised rate schedules filed pursuant to Section I hereof, shall not be made effective prior to December 27, 1954, nor result in revenues less than the agreed cost of service. It is also agreed that, if so required by decision of the Commission on further hearings herein, Northern shall incorporate in revised rate schedules filed to become effective on or after December 27, 1954, the methods and principles found by the Commission, subject to judicial review, to be proper as to zones and rate differentials, with due regard to the recovery of reasonable cost of service."

The total cost of service for the year 1954 agreed upon for the purpose of such settlement was $88,584,957, of which, it was further agreed, $73,083,254 was allocable to jurisdictional sales. There was also agreement in this settlement as to the allocation of such costs to the functions of production, transmission, distribution, customers accounting and collecting and sales promotion.

In the preparation and presentation of evidence in the hearing in this matter, the Staff, of course, was bound by these provisions of the stipulation. Accordingly, in the allocation of costs to the several proposed zones the Staff used the costs as allocated to functions for the purpose of the settlement.

In the allocation so made for the purpose of the settlement the transmission costs of Permian Basin Pipeline Company, Northern's subsidiary and a supplier, were

added to the transmission costs of Northern, although the delivery of gas by Permian is made at the southern terminus of Northern's own system. While such an allocation was proper for the purpose of establishing rates on a system-wide basis, the transmission costs of Permian should not here be spread on a mileage basis but rather should be included with other production and supply costs and spread on the basis of sustained peak demand and annual sales. In the settlement allocation a part of the administrative and general expense was also assigned to the transmission function as were costs of transmission and compression of gas by others before entry into the transmission system facilities. Since these costs are not specifically related to the miles of gas transportation, they too should properly be distributed on the basis of sustained peak demand and annual sales.

We also find that the Staff's allocation of distribution and customers' accounting and collecting costs on the basis of sales delivery points produces wholly disportionate results. Under this procedure the same amount of expense is attributed to the point of smallest volume of sales and requiring the smallest of metering and regulating equipment as is attributed to the largest of customers whose purchases require the most expensive metering and regulating equipment. Since the record does not provide a breakdown of these costs sufficient to determine the actual cost at each point of delivery, we find that it would be proper for the present purpose to distribute one-half of these costs according to the number of delivery points and one-half in the proportion of the volume of sales. In this manner, recognition would be given in part at least to the comparative size of the vari-

ous markets served and to the varying costs related thereto. As so modified, we will utilize hereinafter the allocation procedure of the Staff.

As so modified we believe the cost allocation procedure proposed by the Staff to be most suitable for the purpose of this case, and we adopt it for this purpose.

Subsequent to the close of the hearing on the phase of the proceeding here under consideration, Northern, on July 2, 1954, filed revised uniformly applicable rate schedules designed to provide an increase in revenues from jurisdictional sales of $8,128,405, or 10.4 per cent annually over and above the revenues estimated to be produced by the rates allowed to become effective pursuant to the settlement and our order herein issued January 28, 1954. The proposed increase in rates was based on sales for the year ended March 31, 1954, as adjusted. In support of this increase, Northern relies principally on claimed costs of new plant facilities, the majority of which were not then estimated to go into service until September and October, 1954. The total cost of service claimed by Northern in this filing is $103,533,908, as contrasted to the amount of $88,584,957 stipulated as the cost of service to be used for the purpose of the hearing in this instant proceeding.

By order issued July 29, 1954, at Docket No. G-2505, we suspended and deferred the use until December 27, 1954, of the increased schedules filed July 2, 1954. Thereafter, pursuant to proper motion of Northern, the suspended schedules were allowed to become effective as of December 27, 1954, subject, however, to the condition, among others, that Northern shall refund, with interest,

the portion of such increased rates or charges as the Commission may by its decision in that proceeding find not justified. Since the proceedings have not been concluded and a decision has not been made in the matter at Docket No. G-2505, the increased rates are now being collected, subject to possible refund of a portion thereof.

Considering the lapse of time occasioned by necessary procedures in this case and the facts recited above, it would be inappropriate and improper to now require by order in this proceeding that Northern file substitute revised tariff sheets to be made effective as of a retroactive date or based upon a cost of service less than that claimed by Northern in its previously mentioned filing of July 2, 1954.

Of the total cost of service claimed in support of the filing of July 2, 1954, Northern has allocated $86,538,101 to the jurisdictional sales. However, the procedures used by Northern in making such allocation are unlike those prescribed by the Commission in its Opinion No. 228, in earlier proceedings concerning Northern's rates, which were followed also in the settlement of the other aspects of this instant matter.

Using the claimed jurisdictional cost of service of $86,538,101, but applying thereto the principles and methods of cost classification and allocation hereinbefore found to be proper, we obtain the following results:

	Rate Schedule CD-1 Demand Charge	Commodity Charge	Over-run Commodity Charge	Over-run 70 per Cent Load Factor	Average Cost 80 Per Cent Load Factor	100 Per Cent Load Factor
one 1	$0.94	22.92¢	22.93¢	27.41¢	26.85¢	26.06¢
one 2	$2.00	23.80¢	23.80¢	33.32¢	32.13¢	30.47¢
one 3	$2.08	26.48¢	26.48¢	36.38¢	35.14¢	33.41¢

The estimated volumes of sales for resale shown in the new rate filing of Northern reflect an annual load factor for this class of sales of about 70 per cent. At this load factor, it will be noted, the differential in average cost to the purchasers in Zones 2 and 3 is shown in the tabulation to be 3.06 cents per Mcf. Considering, however, that this differential is calculated on the basis of the total cost claimed by Northern, which in certain respects at least is not in accord with prior decisions of the Commission in proceedings involving rates of Northern, and the fact that past experience indicates the possibility that Northern may not be able to fully support its claimed cost of service, we are of the opinion that the maximum differential in rates to be made effective at this time on an interim basis, subject to subsequent adjustment and possible refund, should be about 2.00 cents per Mcf. This differential is the difference in average cost per Mcf purchased at a load factor of 70 per cent. The following tabulation reflects a recasting of the rates shown in the previous tabulation to produce a differential between Zones 2 and 3 of 2.04 cents per Mcf, which is as close as can be computed:

	Rate Schedule CD-1 Demand Charge	Commodity Charge	Over-run Commodity Charge	Average Cost Per Mcf 70 per Cent Load Factor	80 Per Cent Load Factor	100 Per Cent Load Factor
Zone 1	$1.75	23.5c	23.5c	31.83c	30.79c	29.33c
Zone 2	$2.00	24.3c	24.3c	33.82c	32.63c	30.97c
Zone 3	$2.07	26.0c	26.0c	35.86c	34.63c	32.90c

As previously noted, the parties opposed to zoning, including Northern, contend that an increase in rates will result in the loss of industrial sales to competitive fuels by some of Northern's customers. In deference to this

position, Northern, in its rate filing of July 2, 1954, proposed no increase in the commodity component of its rate and instead increased only the demand component.[19] Furthermore, by such filing, Northern proposed the elimination of the differential of 2 cents per Mcf heretofore added to the commodity component to arrive at the rate for the purchase of "over-run gas," being volumes in excess of the contracted demand.[19] We find the evidence on this point of contention something less than convincing. No evidence whatsoever in this respect was offered by Northern States Power Company, an intervener herein and an active opponent of zoning, which is undoubtedly the largest consumer of industrial gas supplied by the Northern system and certainly well provided with information and data as to the costs of purchasing and handling other competitive fuel. However, the proceedings at Docket No. G-2505 will provide a further opportunity to develop evidence on this point. Furthermore, experience under zone rates pending disposition of those proceedings will give further indication of the probable future trend of industrial sales of natural gas in the area served by Northern. All of which can be given consideration in the decision in the proceedings at said

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19 In explanation, Northern states in its rate filing of July 2, 1954, that:

"In order that a favorable competitive position be maintained for large volume loads, it is the judgment of Northern's management that the commodity charge under Rate Schedule CD-1 should not be increased at this time. Accordingly, the commodity charge has been retained at the present level 22.1c per Mcf and the demand charge increased from $2.21 to $2.70 per Mcf of billing demand in order to recover cost of service. * * *

"The same considerations have led Northern's management to propose that the overrun price of 24.1c per Mcf in the presently effective R-1 Rate Schedule be reduced to 22.1c per Mcf, the same as the commodity charge under Rate Schedule CD-1."

Docket No. G-2505, including the fixing of the level of rates in each zone. Accordingly, at this time we will permit Northern, if it chooses so to do, to maintain in the rate schedules filed pursuant to the order in this instant matter a uniform commodity charge throughout its system, and to adjust the demand component of the rates to provide a differential between zones of approximately 2.00 cents per Mcf at a 70 per cent load factor as indicated in the tabulation last above.

As their final point of argument, the parties designated as the Opponents appear to suggest, although they do not so state, that the proviso of Section 5 (a) of the Natural Gas Act precludes the Commission from requiring northern by order to establish service zones and rate differentials. This proviso, however, does not preclude the Commission from granting the relief sought in this proceeding.[20] To hold otherwise would do violence to the purpose and object of the legislation.

Undue discrimination or preference, as found to exist by reason of the present rate practice of Northern, may be eliminated in several ways, of which an increase in rates for certain service is only one. Section 5 (a) specifically provides also that "the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates." It would also be quite

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20 In **Michigan Consolidated Gas Company v. Panhandle Eastern Pipe Line**, 173 F. 2d 784, 789, the Court of Appeals said:

"Whatever may be the limits placed by the (Natural Gas) Act upon the authority of the Commission in other respects, it is clear that under Sec. 717c (b) (Sec. 4(b) the authority of the Commission, in respect to undue preferences or advantages is without limitation."

proper for the Commission, upon the finding of undue discrimination or preference under the facts of this case, to determine appropriate zones of service and require Northern to file appropriate rates which would not be unduly discriminatory or preferential.[21] And the Commission may, as we do here, in the circumstances of a particular case merely determine and fix the differential in rates that is reasonable and necessary to eliminate existing unlawful discrimination and preference, leaving to the company the decision as to how such differential shall be incorporated into its rate schedules. As the Supreme Court has said:[22]

> "The Constitution does not bind rate-making bodies to the service of any single formula or combination of formulas. Agencies to whom this legislative power has been delegated are free, within the ambit of their statutory authority, to make the pragmatic adjustments which may be called for by particular circumstances."

The Commission further finds, for the reasons given and upon the findings hereinbefore set forth:

(1) Northern Natural Gas Company, a corporation organized and existing under the laws of the State of Delaware, is engaged in the transportation of natural gas in interstate commerce and in the sale in interstate commerce of such gas for resale, and, is, therefore, a "natural-gas company" within the meaning of the Natural Gas Act.

(2) The demanding, charging, and collecting by Northern of uniform rates and charges for all sales of natural

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21 Federal Power Commission, et al. v. Natural Gas Pipeline Company, et al., 315 U. S. 575, 583-585.
22 Idem. Page 586.

gas by it, subject to the jurisdiction of the Commission, is unduly discriminatory and preferential, and therefore, unlawful.

(3) The establishment of zones of service with proper differentials in the rates and charges applicable to sales in the respective zones, subject to the jurisdiction of the Commission, would be the most effective and equitable means of fixing rates and charges which would be not unduly discriminatory or preferential;

(4) Northern should be required to file appropriate revisions to its FPC Gas Tariff to provide for the division of its system into three rate zones bounded in the manner and at the locations specifically shown on the map following page 26 hereof, as hereinafter ordered and conditioned.

(5) The statement of settlement of the issues in this proceeding other than those respecting service zones and rate differentials, which was agreed to by Northern and all other parties and approved by the Commission, provides, among other things, that:

"SECTION VII

"* * *

"For the purposes of this settlement it is further agreed that the decision of the Commission respecting such issue of service zones and rate differentials, if it requires a change in the revised rate schedules * * *, shall not be made effective prior to December 27, 1954, nor result in revenues less than the agreed cost of service. It is also agreed that, if so required by decision of the Commission on further hearings herein, Northern shall incorporate in revised rate schedules to become effective on or after December 27, 1954, the methods and principles found by the Commission, subject to judicial review, to be proper as to zones and rate differentials, with due regard to the recovery of reasonable cost of service."

(6) The adjusted total cost of service agreed upon in the above-mentioned approved settlement was $88,584,957 for the twelve-month's period ending December 27, 1954, the test period, of which amount, it was further agreed, $73,083,254 was properly allocable to jurisdictional sales.

(7) On July 2, 1954, Northern filed certain revised sheets to its FPC Gas Tariff proposing an increase in rates and charges of $8,128,405 annually over and above the rates and charges allowed to become effective as of December 27, 1953, pursuant to said approved settlement. These proposed increases were based upon estimated sales for the year ended March 31, 1954, as adjusted, and a claimed over-all cost of service for that period of $103,533,908. Of this total Northern has allocated $86,538,101 to the jurisdictional sales.

(8) By order issued July 29, 1954, at Docket No. G-2505, the Commission suspended and deferred the use until December 27, 1954, of the said revised sheets filed on July 2, 1954. Thereafter, by order issued January 7, 1955, upon proper motion of Northern, said revised sheets and increased rates and charges were allowed to take effect as of December 27, 1954, subject to such refunds as might be thereafter ordered by the Commission.

(9) In view of the facts set forth in paragraphs (6), (7), and (8) hereinbefore, it would be inappropriate to now require by order in this proceeding that Northern file substitute revised tariff sheets to be made effective as of a retroactive date or based upon a total cost of service less than that claimed by Northern in its previously mentioned filing of July 2, 1954.

(10) Northern should be required to file with the Commission revised sheets to its FPC Gas Tariff, satisfactory to the Commission, containing Schedules of rates and charges which would produce from sales for resale in the herein defined Zone 1 an average

revenue approximately 2.00 cents per Mcf less than the average revenue from similar sales in Zone 2, and an average revenue from sales for resale in Zone 2 approximately 2.00 cents per Mcf less than the average revenue from similar sales in Zone 3, but said differentials in average revenue shall be not less than 1.95 cents per Mcf; Provided, however, that the design of said schedules of rates and charges shall be based on the billing determinants for sales for resale as estimated by Northern for the purpose of its aforementioned filing of July 2, 1954, and the required differentials in average revenue should be as computed at sales equivalent to use each month of contract demand at a 70 per cent load factor; And, provided, further, that the design of said schedules of rates and charges shall be based upon a cost of service for jurisdictional sales not to exceed $86,538,101.

(11) The revised tariff sheets to be filed as contemplated by paragraphs (4) and (10) hereinbefore should be made effective as of May 27, 1955, for all sales of gas by Northern for resale, subject to such refunds as may be hereafter ordered by the Commission in the aforesaid proceedings at Docket No. G-2505, and said revised tariff sheets as of that date should be substituted for First Revised Sheets 5, 6, and 7 to Northern's FPC Gas Tariff, Original Volume No. 1, which became effective as of December 27, 1954, subject to such refunds as may be hereafter ordered by the Commission.

The Commission orders:

(A) Northern, within fifteen (15) days from the date of issuance hereof, shall file with the Commission revisions to its FPC Gas Tariff, satisfactory to the Commission, to provide for the division of its natural-gas transmission system into three zones bounded in the manner and at the locations specifically shown on the map following page 26 hereof.

(B) Northern, within fifteen (15) days from the date of issuance hereof, shall file with the Commission revised sheets to its FPC Gas Tariff, satisfactory to the Commission, containing schedules of rates and charges which would produce from sales of gas for resale in the heretofore prescribed Zone 1 an average revenue approximately 2.00 cents per Mcf less than the average revenue from similar sales in Zone 2, and an average revenue from sales for resale in Zone 2 approximately 2.00 cents per Mcf less than the average revenue from similar sales in Zone 3; Provided, however, that said differentials in average revenue shall be not less than 1.95 cents per Mcf. The design of said schedules of rates and charges shall be based on the billing determinants for sales for resale as estimated by Northern for the purpose of its aforementioned filing of July 2, 1954, and the required differentials in average revenue shall be as computed at sales equivalent to use each month of contract demand at a 70 per cent load factor.

(C) The schedules of rates and charges in the revised tariff sheets to Northern's FPC Gas Tariff to be filed pursuant to paragraph (B) above shall be designed so as to produce to Northern total revenues from sales of natural gas, subject to the jurisdiction of the Commission, not to exceed $86,538,101, based upon sales for the year ended March 31, 1954, as adjusted, as estimated by Northern for the purpose of the aforesaid filing of July 2, 1954.

(D) The revised tariff sheets filed pursuant to paragraphs (A), (B), and (C) above shall be effective as to all sales of gas, subject to the jurisdiction of the Commission, made on and after May 27, 1955, subject to such refunds as may be hereafter ordered by the Commission in the aforesaid proceedings at Docket No. G-2505.

(E) The revised tariff sheets filed pursuant to paragraphs (A), (B), and (C) above shall be substituted

as of May 27, 1955, for First Revised Sheets, 5, 6, and 7 to Northern's FPC Gas Tariff, Original Volume No. 1, which became effective as of December 27, 1954, subject to such refunds as may be hereafter ordered by the Commission in the aforesaid proceedings at Docket No. G-2505.

By the Commission, Commissioners Draper and Smith dissenting in part.

LEON M. FUQUAY,
Secretary

Adopted May 19, 1955
Issued: May 20, 1955

In the matter of Northern Natural Gas Company

Docket No. G-2217

Draper and Smith, Commissioners, dissenting in part:

We concur fully in the conclusion of the Commission that Northern's uniform, system-wide rate structure results in undue discrimination. This, we agree, should be removed by the creation of the rate zones provided for herein and the establishment of rates which will reasonably reflect the relative costs of service within each zone.

According to the allocation method adopted in this case, the differential in average costs between Zone 2 and Zone 3 is 3.06 cents per Mcf, based on Northern's most recent estimate of sales for resale at an annual load factor of 70 per cent. We do not hold that allocated costs should be followed slavishly in designing rates. We recognize, furthermore, that, when departures from historical rate patterns are to be made, some softening of the impact may be appropriate. We are not convinced by the

evidence in this record, however, that there is reason for the majority's reduction of the indicated differential between Zones 2 and 3 from 3 cents per Mcf to 2 cents.

In our view it would be more equitable to establish an initial differential of 2½ cents. This would be subject to further consideration and adjustment in Dock No. G-2505 should the evidence therein show that such differential should be modified.

Claude L. Draper, Commissioner

Nelson Lee Smith, Commissioner

Filed: May 19, 1955
Issued: May 20, 1955

APPENDIX B

UNITED STATES COURT OF APPEALS

For the Eighth Circuit

No. 15,424

Northern Natural Gas Company,
a corporation,

Petitioner,

vs.

Federal Power Commission,

Respondent

ORDER GRANTING PARTIAL STAY OF OPINION AND ORDER NO 281 OF THE FEDERAL POWER COMMISSION AND FIXING TERMS AND CONDITIONS OF SUCH STAY

(November 18, 1955)

Arguing:

F. Vinson Roach for Northern Natural Gas Co.

W. Russell Gorman for Federal Power Commission.

Raymond A. Smith for interveners Central Electric & Gas Co., Council Bluffs Gas Co., Iowa Power & Light Co., and Metropolitan Utilities District of Omaha.

P. L. Farnand for Minneapolis Gas Co.

Also present:

J. F. Kinney, representing Iowa Public Service Co.

Henry F. Reed and Hubert C. Jones, representing Iowa Power & Light Co.

Lloyd J. Marti, representing Central Electric & Gas Co.

John F. Gaston, representing Northwestern Light & Power Co. and Iowa Electric Light & Power Co., Intervener.

George C. Pardee, representing Metropolitan Utilities District of Omaha.

Norman H. Nitzkowski, representing Minnesota Valley Natural Gas Co., Intervener.

Richard J. Connor, George J. Meiberger and Patrick J. McCarthy, representing Northern Natural Gas Co.

Before Sanborn, Woodrough and Johnsen, Circuit Judges.

This cause came on for hearing on October 21, 1955, upon the petition filed herein on September 23, 1955, by Northern Natural Gas Co., for a partial stay, pending judicial review, of Opinion and Order No. 281, issued by the Federal Power Commission against Northern Natural on May 20, 1955, and upon the resistance made by the Federal Power Commission and by Interveners Central

Electric & Gas Co., Council Bluffs Gas Co., Iowa Power & Light Co., and Metropolitan Utilities District of Omaha, to the granting of such a stay.

On consideration of the Opinion and Order of the Commission, of the arguments, briefs and showings made by the parties, and of the elements generally which appear with substantially to exist upon the whole situation, the Court finds, concludes and makes order in accordance with the expressions which follow.

Opinion and Order No. 281 requires Northern Natural to divide the territory served by it into three geographical zones—Zones 1, 2, and 3—and to place into effect new rates for each respective zone, using a certain differential between the rates of the several zones, with such zone rates to take the place of the previous uniform scheme of rates which Northern Natural had had in effect throughout its territory generally. The result of the use of the required zone differentials is to cause the revenues of Northern Natural from the sale of its gas in Zones 1 and 2 to be reduced approximately $1,225,000 annually, but to cause its revenue in Zone 3 to be increased in an approximately corresponding amount.

Northern Natural, by petition for review, has attacked the validity of the Commission's requiring it to place such zone rates in effect in its present stage of business development and the propriety of the basis and the proceedings by which this was immediately done. Intervener-Distributors in Zone 3 have similarly filed a petition for review of the Commission's order in relation to the propriety and effect of the Commission's proceedings and order as to Zone 3.

The effect of granting the stay requested by Northern Natural would be to permit it to enjoy the advantage of the zone differential in Zone 3, while at the same time allowing it to continue to charge the previous, higher, uniform rate in Zones 1 and 2. The basis of the request made is that, if the Commission's order should be overthrown, there is such probability of irreparable injury to Northern Natural, from its inability to go back and collect against its distributors the difference between the old uniform rate and the new zone rates, as should prompt the granting of the stay, and that the excess amount collected by it in Zone 3 over the old uniform rate could in the event of such an overthrow be refunded by it to its distributors. Similarly, it is argued that, in the event the Commission's order should be affirmed, no distributors in Zones 1 and 2 would have been hurt by the stay, since the excess collected from them over the zone rates could then readily be refunded to them.

The questions involved in the review generally appear to have sufficient substantiality, and the complications possible in the situation appear to be capable of giving rise to such a reasonable probability of irreparable injury, as discretionarily to warrant us in granting the stay requested. But we should not feel particularly disposed to do so in the present peculiar situation upon these grounds alone, were there not other matters involved which cause us some concern. These relate to the question of where ultimate consumers are likely to be left in the situation and how they can best be protected generally.

It appears from the information before us on the hearing that the distributors in Zones 1 and 2 (with per-

haps a local exception) are going to continue to charge their consumers the same rate as before, until the present review proceeding is disposed of, without giving them the benefit of the rate reduction which would accrue to the distributors, if Northern Natural's request for a stay should be denied. Thus, the four intervener-distributors who have appeared in resistance to Northern Natural's request for a stay, have apparently to date made no reduction to their consumers, nor have they urged any desire or intention on their part to do so as a basis for their objection to the granting of the stay. It is perhaps only natural that, even without a stay, any distributor in Zones 1 and 2 would seek to safeguard itself against the possibility of being held liable to Northern Natural for any additional amount over the zone rate, in case the Commission's order should be reversed.

But in case the Commission's order should be affirmed, the Court, without a stay having been granted, will be in no position to protect ultimate consumers. If a stay is granted, Northern Natural can be required by us to make refund to such ultimate consumers. And if the order of the Commission is reversed, Northern Natural will have been protected in its right to receive the funds collected.

Again, as to Zone 3, the distributors will apparently have collected from their consumers the amount of the increase which they are being compelled to pay to Northern Natural. Should the Commission's order be reversed, the Court, unless the requested stay is granted and the granting of the stay is tied in with a requirement against Northern Natural, as a condition of its acceptance of the privilege permitted as to Zones 1 and 2, that it must make

refund of the excess collected by it in Zone 3 to the ultimate consumers of the zone, the court similarly, as in the case of Zones 1 and 2 on an affirmance, will be without any handhold to protect ultimate consumers.

On all of these considerations, we feel that it is in the best interest of gas consumers, and not of Northern Natural alone, that the requested stay be granted.

IT IS ACCORDINGLY HEREBY ORDERED—

1. That Opinion and Order No. 281 of the Federal Power Commission be and hereby is stayed and suspended, in its application to Zones 1 and 2 as fixed therein, from and after September 23, 1955, the date of the filing of the petition of Northern Natural Gas Co. for such stay, until the further order of this Court or until the stay otherwise may have ceased to be effective as a matter of law—such stay, however, to be operative, effective and available to Northern Natural Gas Co. only upon the basis of its acceptance of and compliance with the terms and conditions following.

2. That upon this order becoming effective, through the acceptance of and compliance with its terms and conditions on the part of Northern Natural Gas Co., the Federal Power Commission and its members and the staff thereof are hereby enjoined, until the further order of this Court, or until the stay otherwise may have ceased to be effective as a matter of law, from enforcing the provisions of its Opinion and Order No. 281 against Northern Natural Gas Co., as related to the rates to be charged by Northern Natural in Zones 1 and 2 under such Opinion and Order.

3. That it is a condition of this order of stay that Northern Natural Gas Co., shall keep accurate accounts, in detail for each billing period, of all amounts collected by it by virtue of and under the authority of this stay order and shall report the same monthly to the Clerk of this Court in writing and under oath, with a copy of said report to be mailed to the Federal Power Commission, and that, in the event of an affirmance of said Opinion and Order No. 281, Northern Natural Gas Co. shall make refund of the amounts so collected, in such manner and to such persons as the Court may direct, with interest thereon at such rate as the Court may fix, not exceeding six per cent per annum, and with Northern Natural to bear the expense, or such part thereof as the Court may require, of making such refunds and of effecting a complete disposition of the accumulated fund.

4. That it further is a condition of this order of stay that Northern Natural Gas Co., in the event of a reversal of the Opinion and Order No. 281, having the effect of making the rates charged in Zone 3 amount to a legal overcharge, shall make refund of such collected excess, in such manner and to such persons as the Court may direct, with interest thereon at such rate as the Court may fix, not exceeding six per cent per annum, and with Northern Natural to bear the expense, or such part thereof as the Court may require, of making such refunds and of effecting a complete disposition of the overcharge funds; and that Northern Natural shall hold such possible excess funds and keep such records and accounts of them as will enable it at any time to furnish the Court, upon request, with full information concerning them.

5. That the funds, as referred to in paragraphs numbered 3 and 4, in their accumulation, holding and contemplated disposition, are intended to be for the benefit of ultimate consumers as a class, but no legal right in relation to their distribution shall exist in or become vested in any individual consumer to any part thereof, except as such a right may hereafter be established and decreed by the Court, in relation to persuading equities and administrative practicalities.

6. That, if any distributor in Zones 1 or 2 shall, since the issuance of Opinion and Order No. 281, have reduced its rates to its consumers, pursuant to and in an amount equivalent to the reduction accruing to it thereunder, or if any such distributor shall hereafter take such action, it may make application for consideration by the Court of a partial vacating or nullifying of the operation of the stay order in its application to such distributor.

7. That, if any distributor in Zone 3 shall not have increased its rates to its consumers on the basis of or in relation to Opinion and Order No. 281, and the order of the Commission should be reversed, it may make application, for the court's consideration, to have the amount collected from it, which Northern Natural would in that event be required to refund under the conditions of this order, paid to it instead of to its customer-consumers.

8. That the Court reserves the power and jurisdiction to make such further orders in the matter as may be necessary or seem to it expedient, including, among other things, the right to terminate at any time, in whole or part, the stay hereby granted, and to do whatever else may be necessary to effect a full and final disposition of

any of the funds involved herein, in such manner as it shall deem most practicable to serve the purposes of the Natural Gas Act under all the circumstances involved.

9. That this order shall be served by the Clerk of this Court upon the Respondent, the Federal Power Commission, and the Interveners herein by mailing a copy thereof to said Respondent and said Interveners or their attorneys of record.

10. That Northern Natural Gas Co. shall file with the Clerk of this Court its bond, with good and sufficient surety, in the principal amount of $100,000, conditioned generally for the performance by it of all the provisions, terms and conditions of this order, to be approved by a Judge or the Clerk of this Court.

Entered this 18th day of November, 1955.

By the Court:

JOHN B. SANBORN, Judge Presiding.

APPENDIX C

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Jerome K. Kuykendall, Chairman; Seaborn L. Digby, Frederick Stueck, William R. Connole and Arthur Kline.

In the Matters of:

Northern Natural Gas Company—Docket No. G-2505

Northern Natural Gas Producing Company—Docket No. G-9409

Permian Basin Pipeline Company—Docket No. G-9410

ORDER APPROVING A PROPOSED SETTLEMENT AND REQUIRING TARIFF REVISIONS TO BE FILED AND TERMINATING PROCEEDINGS

(Issued July 26, 1956)

On July 2, 1954, Northern Natural Gas Company (Northern) filed certain revised sheets to its FPC Gas Tariff providing increased rates for all of its sales of natural gas for resale, subject to the jurisdiction of the Commission. The increase was proposed to be effected by increasing the demand charge of the rate then uniformly applicable throughout Northern's system from $2.21 per Mcf to $2.70 per Mcf. No change was proposed in the commodity component of the rates, which continued to be 22.1 cents per Mcf. The amount of the increase provided was approximately $8,100,000.

By order issued July 29, 1954, in Docket No. G-2505, the Commission suspended and deferred the use until December 27, 1954, of the said revised sheets filed on July 2, 1954. Thereafter, by order issued January 7, 1955, upon proper motion of Northern, said revised sheets and increased rates and charges were allowed to take effect as of December 27, 1954, subject to such refunds as might be thereafter ordered by the Commission.

Meanwhile, in the proceedings at Docket No. G-2217 which had been initiated long prior to Northern's filing in Docket No. G-2505, the Commission on May 20, 1955, issued its Opinion No. 281 and accompanying order prescribing rate zones for Northern's system and requiring the filing of schedules of rates and charges providing rate

differentials for such zones. Said order further provided that the zone rates provided for therein would be subject to such refunds as may be thereafter ordered in the proceedings in Docket No. G-2505.

In pursuance of the order accompanying Opinion No. 281, Northern on July 5, 1955, filed its FPC Gas Tariff, First Revised Volume No. 1 (superseding Original Volume No. 1) containing rates for three zones as ordered. By order issued August 2, 1955, the Commission accepted the revised tariff as satisfactory compliance with the order accompanying Opinion No. 281 and permitted it to become effective as of June 27, 1955, subject to refund, in substitution of the rate schedules originally filed in Docket No. G-2505.

Northern, however, on September 9, 1955, filed with the United States Court of Appeals for the Eighth Circuit in Case No. 15,424, a Petition to Review, Set Aside and Reverse Opinion No. 281 and accompanying order, and on September 23, 1955 filed with that Court a Petition for Partial Stay of said Opinion and accompanying order pending judicial review thereof. By order issued November 18, 1955, the Court granted the partial stay requested by Northern. On August 18, 1955, several intervenors in Docket No. G-2217 filed a like Petition to Review which was docketed in the United States Court of Appeals for the Eighth Circuit as Case No. 15,412.

By opinion of July 9, 1956, the Court of Appeals for the Eighth Circuit affirmed Opinion No. 281 and accompanying order. As yet there has been no indication of whether the appellants in those proceedings contemplate further appeal, or the immediate disposition of the stay

order of the Court of Opinion No. 281 and accompanying order.

The legal effect of the Court's stay was to permit Northern, from and after September 27, 1955, to collect, subject to further order, its previously effective uniform demand charge of $2.70 per Mcf in Zones 1 and 2 in lieu of the zone demand charges of $2.05 per Mcf and $2.47 per Mcf, respectively, in such zones as contained in its FPC Gas Tariff, First Revised Volume No. 1, filed July 5, 1955. In Zone 3, Northern continued to collect the zone demand of $2.88 per Mcf. The commodity component of the rate remained at 22.1 cents per Mcf for all zones.

By order issued April 17, 1956, and with the permission of the Court of Appeals for the Eighth Circuit, the Commission permitted Northern to file Substitute First Revised Sheets Nos. 5 and 6 to its FPC Gas Tariff, Original Volume No. 1, and Substitute Original Sheets Nos. 14, 15 and 16 to its FPC Gas Tariff, First Revised Volume No. 1, superseding similarly numbered First Revised and Original Sheets. These substitute sheets had the effect of reducing by 17 cents per Mcf the demand charges of Northern's rates (a) as proposed by Northern in its filing of July 2, 1954, on a uniform system-wide basis, (b) as filed by Northern pursuant to the order accompanying Opinion No. 281, and (c) as provided by the stay order of the Court of Appeals for the Eighth Circuit.

By order issued September 29, 1955, the proceedings in Docket No. G-2505 were consolidated with proceedings in Docket Nos. G-9409 and G-9410 for purposes of hearing.

Docket No. G-9409 and Docket No. G-9410 are investigations instituted by separate Commission orders issued

September 29, 1955, into and concerning all rates and charges of Northern Natural Gas Producing Company (Producing Company) and Permian Basin Pipeline Company (Permian), respectively, for and in connection with any sale and transportation of natural gas, subject to the jurisdiction of the Commission. Producing Company and Permian are both subsidiaries of Northern and each is a major supplier of natural gas to the parent company.

Hearings in the consolidated proceedings were commenced on January 16, 1956, and have continued intermittently since that date, with necessary recesses. During such hearings Northern presented its case-in-chief and the Commission Staff presented its evidence.

Pursuant to request of Staff Counsel, and with concurrence of all parties, conferences among the parties to these proceedings were held on June 13, 14, 21, and 22. On June 22, 1956, final agreement was reached by all parties to the proceedings respecting the matters and issues related to the several proceedings in Docket Nos. G-2505, G-9409 and G-9410. The text of such agreement was submitted to the Commission by a stipulation read into the record of proceedings on June 28, 1956.

The Commission's Staff computed a net investment rate base for Northern for the year 1955, as adjusted of $251,923,968, including an allowance of $6,360,000 for working capital computed in recognition of the availability of accruals for Federal taxes on income. Allowing a 6 per cent return upon this rate base, the Staff developed a total cost of service for Northern of $97,954,642 for the year ended December 31, 1955. Of this total, $84,277,761 was allocated by the Staff to jurisdictional sales. This

cost of service estimate was submitted in evidence in these proceedings and rates were devised which it was agreed would yield adequate revenues from Northern's sales in interstate commerce for resale and would be fair and reasonable and acceptable to all parties, subject to the terms and conditions of the settlement hereinafter stated.

Because of the pendency of the appeal of Opinion No. 281 and accompanying order, alternate rates were agreed upon the following basis: first, rates for the zones prescribed by Opinion No. 281 and accompanying order; and, secondly, a uniform system-wide rate as contended for by Northern and other parties appealing Opinion No. 281 and accompanying order. The agreed zone rates would yield revenues of $84,170,448 for the test year, 1955, as adjusted, while the uniform system-wide rate would yield $84,159,721 for the test year.

It was agreed that Northern should file with the Commission rate schedules embodying appropriate rates in accordance with the settlement, subject to the filing of amended and superseding rate schedules, as provided, upon final determination of the appeal of Opinion No. 281, and accompanying order. The agreed upon rates on a zone basis were computed to provide a differential of approximately 2 cents per Mcf at a load factor of 70 per cent and are as follows:

Rate Schedules	Demand Charge	Commodity Charge	Overrun Commodity Charge	Average Cost Per Mcf 70% Load Factor
CD-1 (Zone 1)	$1.73	21.9c	21.9c	30.14c
CD-2 (Zone 2)	$2.04	22.4c	22.4c	32.11c
CD-3 (Zone 3)	$2.36	22.9c	22.9c	34.14c

The rates agreed upon on a uniform system-wide basis are as follows:

Rate Schedule CD-1 Demand Charge	Commodity Charge	Overrun Commodity Charge	Aeverage Cost per Mcf 70% Load Factor
$2.28	22.4c	22.4c	33.26c

It was further agreed that commencing June 27, 1956, and continuing as long as the above-mentioned stay order issued by the United States Court of Appeals for the Eighth Circuit in Case No. 15,424—or any similar superseding order—shall continue in effect, the rates applicable for sales of natural gas for resale, subject to the jurisdiction of the Commission, shall be for Zones 1 and 2 the above-stated uniform rate of $2.28 per Mcf demand charge and a commodity charge of 22.4 cents per Mcf, and for Zone 3 sales the rate shall consist of the above-stated demand charge of $2.36 per Mcf and a commodity charge of 22.9 cents per Mcf. It was also agreed that, subsequent to the issuance of this order by the Commission accepting this proposed settlement, Northern shall, by stipulation of the parties or otherwise, forthwith undertake to obtain from the United States Court of Appeals for the Eighth Circuit such order or orders as may be required to enable the Commission to make the above-described rates effective as hereby provided. And it was further agreed that, upon the issuance of an order by the Commission accepting this proposed settlement, Northern shall forthwith file appropriate revised sheets to its tariff, satisfactory to the Commission, to effectuate the reduced rates stated above in this paragraph to be made effective as of June 27, 1956.

Since the statement of settlement was agreed upon prior to the filing of the Court's opinion, the statement also provides that in the event of final court affirmance of the Commission's Opinion No. 281 and accompanying order by the United States Court of Appeals for the Eighth Circuit or the United States Supreme Court, as the case may be, or in the event the final decision of the courts affirms the principle of zone rates and the rate zones fixed by said Opinion and order but said final court decision sets aside or remands for further proceedings by the Commission the level of the zone rates, it was agreed that the zone rates set forth above for sales in Zones 1, 2 and 3 should be effective as of June 27, 1956, upon the dissolution of the aforesaid stay order issued by the United States Court of Appeals for the Eighth Circuit in Case No. 15,424, or the dissolution of any superseding stay order, and that Northern shall, within ten (10) days from the dissolution of the present stay order or any superseding stay order, whichever is later, file revised sheets to its tariff, satisfactory to the Commission, providing rates for sales in Zones 1, 2 and 3 as herein set forth.

Because of the then pending appeal in the Court of Appeals, it was also provided in the settlement that in the event the Commission's Opinion No. 281 and accompanying order was reversed or the matter otherwise remanded to the Commission so as to render ineffective the zone rates prescribed by the Commission in said Opinion and Order and the zone rates hereinbefore set forth to be effective as of June 27, 1956, it was agreed that the above-stated uniform rate consisting of a de-

mand charge of $2.28 per Mcf and a commodity rate of 22.4 cents per Mcf should be effective as of June 27, 1956, upon the issuance of the mandate of the United States Court of Appeals for the Eighth Circuit in cases No. 15,424 or No. 15,412 or the United States Supreme Court, as the case may be. It was further agreed that such uniform rate, if made so effective, should be effective for the interim period pending further proceedings herein in accordance with the decision and mandate of the Court and the issuance by the Commission of a final order determining and fixing a rate or rates to be thereafter observed and in force; provided, however, that in no event should such rate or rates be designed to produce jurisdictional revenues less than $84,159,721, based upon the jurisdictional billing determinants set forth in Appendix B, attached hereto, except as may be necessary to give effect to reductions in cost of purchased gas as agreed upon and as hereinafter set forth; provided, further, however, that the agreement did not limit the rights of any party hereto to seek judicial review of such final Commission order.

The zone rates set forth above would produce an estimated increase of $4,030,539 in revenues from Northern's jurisdictional sales over the estimated revenues which would be produced under the rates in effect prior to July 2, 1954, while the over-all system-wide rate would produce an increase of $4,018,812.

In addition to the agreement reached with respect to rates, a number of other matters were considered and agreed upon in the settlement conferences. These matters involve the billing demand and minimum bill pro-

visions of the tariff, the refund of excess charges collected subject to such refund, the effect to be given determinations on pending producer rate increase proceedings and pending action on the Minimum Price Orders of the State of Kansas, and the disposition of the investigation proceedings with respect to Northern Natural Gas Producing Company in Docket No. G-9409 and Permian Basin Pipeline Company in Docket No. G-9410.

For the purposes of the settlement it was agreed that under Northern's CD Rate Schedules to be effective on and after June 27, 1956, as herein provided, the billing demand for a billing month for deliveries for a particular community or billing group served by a customer company of Northern should be the effective contract demand, and the minimum bill should be the demand charge for the month.

For the purposes of the settlement it was also agreed that the determination of the excess revenues collected by Northern subject to refund in these proceedings should await the final disposition of the appeals by Northern and others from the Commission's Opinion No. 281 and accompanying order.

For the purposes of the settlement it was agreed that in arriving at the cost of service for Northern referred to herein the cost of gas purchased by Northern from Phillips Petroleum Company and Shamrock Oil and Gas Corporation and companies involved in and affected by cases questioning the Kansas Minimum Price Orders was computed at rates which are the subject of proceedings before this Commission or before the courts, and which have not been finally determined or fixed.

Accordingly, it was further agreed that, in the event subsequent action by this Commission, or the courts results in a reduction in the cost of gas purchased by Northern from these suppliers of natural gas during the period the rates provided for herein shall be in effect, Northern, within 30 days from the effective date of the order or orders (including judicial review) resulting in such reduction in cost of gas, would file schedules providing reduced rates reflecting the future reduction in cost of gas purchased from its said suppliers. This reduction in rates would be in the demand component of the rate only and would be computed on the basis of the jurisdictional portion of the total adjusted 1955 sales amounting to 303,158,018 Mcf and jurisdictional billing demand units amounting to 11,935,692, all as shown in Appendix B hereto.

Further it was agreed that, in the event subsequent action by this Commission or the courts results in refunds to Northern of any portion of monies paid by Northern to these suppliers of natural gas during the period the rates provided for herein shall be in effect, Northern, within 30 days from the date of the receipt of such refund, would refund to those entitled thereto the portion thereof attributable to jurisdictional sales. The refunds to be made by Northern in such circumstance shall be computed on the basis of the jurisdictional portions of the total 1955 sales amounting to 303,158,018 Mcf and jurisdictional billing demands of 11,935,692 Mcf and volumes and billing demands attributed to each customer as shown in Appendix B hereto.

The agreement further provided, however, that no reduction in rates need be made by Northern, nor shall

refunds be made by Northern as a result of the producer rate proceedings or action on the Kansas Minimum Price Orders until the accumulated amount of refunds from the aforesaid suppliers to Northern aggregate $120,000, or multiples thereof, except for the final refund, which need not be made if the amount involved is less than $25,000. Such refunds, it was agreed, would not bear interest.

In view of the settlement reached in the proceedings in Docket No. G-2505 respecting the rates of Northern and the fact that substantially all of the natural gas produced by Northern Natural Gas Producing Company and Permian Basin Pipeline Company is sold to Northern, it was agreed that further proceedings in Docket Nos. G-9409 and G-9410 are neither required nor necessary, and that the proceedings in these dockets should be now terminated.

For the purposes of this settlement it was further agreed and recognized that the termination of these proceedings at this stage would not be determinative of the reasonableness of the rates of either Northern Natural Gas Producing Company or Permian Basin Pipeline Company. Accordingly, it was further agreed that the termination of the proceedings in Docket Nos. G-9409 and G-9410 under these circumstances should not be construed as a recognition that the rates of Northern Natural Gas Producing Company or Permian Basin Pipeline Company which are the subject of such proceedings are just and reasonable or otherwise.

Staff Counsel, with the concurrence of all parties, moved for omission of the intermediate decision procedure

in these proceedings and requested the Commission to forthwith render the final decision herein. This motion is deemed to be granted in accordance with the provisions of Section 1.30 (c) of the Commission's Rules of Practice and Procedure (18 CFR) 1.30 (c)). The Commission *finds:*

(1) The proposed settlement of these rate proceedings on the basis heretofore described, subject to the terms and conditions hereinafter ordered, is appropriate and in the public interest in carrying out the provisions of the Natural Gas Act and should be approved and made effective as hereinafter provided and ordered.

(2) In the event subsequent action by this Commission or the courts results in a reduction in the cost of gas purchased by Northern from Phillips Petroleum Company and Shamrock Oil and Gas Corporation and companies involved in and affected by cases questioning the Kansas Minimum Price Orders during the period the rates provided by paragraphs (B) and (C) below shall be in effect, Northern should, within 30 days from the effective date of the order or orders (including judicial review) resulting in such reduction in cost of gas, file schedules providing reduced rates reflecting in the demand component thereof the future reduction in the cost of gas purchased from its said suppliers.

(3) In the event subsequent action by this Commission or the courts results in refunds to Northern of any portion of monies paid by Northern to Phillips Petroleum Company and Shamrock Oil and Gas Corporation and the companies involved in and affected by cases questioning the Kansas Minimum Price Orders during the period the rates provided by paragraphs (B) or (C) below shall be in effect, Northern, within 30 days from the date of the receipt of such re-

fund, should refund to those entitled thereto the portion thereof attributable to jurisdictional sales.

(4) The reduced rates and refund set forth in schedules filed pursuant to paragraphs (2) and (3) above shall be computed on the basis of the jurisdictional portion of Northern's total adjusted 1955 sales amounting to 303,158,018 Mcf and jurisdictional billing demand units amounting to 11,935,692, all as shown in Appendix B hereto.

(5) No reduction in rates or refunds pursuant to paragraphs (2) and (3) above should be required to be made by Northern until the accumulated amount of refunds from the aforesaid suppliers to Northern aggregate $120,000 or multiples thereof, except for the final refund, which need not be made if the amount involved is less than $25,000. Furthermore, the refunds by Northern contemplated by this paragraph and paragraph (3) above should not bear interest.

6) The billing demand in Northern's CD Rate Schedules for a billing month for deliveries for a particular community or billing group served by a customer company of Northern should be the effective contract demand and the minimum bill shall be the demand charge for the month.

The Commission *orders:*

(A) The increased rates and charges provided in Northern's aforementioned filings of July 2, 1954, and July 5, 1955, as well as the rates and charges permitted to become effective by reason of the stay order of the United States Court of Appeals for the Eighth Circuit as subsequently permitted to be modified by the rates and charges permitted to become effective by the Commission's order issued April 17, 1955, be and the same are hereby disallowed.

(B) Within ten (10) days after the date of issuance of this order, Northern (1) shall file, in a form satis-

factory to the Commission, and (2) shall undertake to obtain from the United States Court of Appeals for the Eighth Circuit such order or orders as may be required to make effective, revised tariff sheets providing the rates and charges heretofore set forth on page 4 as the rates to be effective as of June 27, 1956 and during the pendency of any court stay of Opinion No. 281 and accompanying order.

(C) Within ten (10) days of the final court affirmance or reversal or remand of Opinion No. 281 and accompanying order and the dissolution of any then effective stay order, Northern shall file revised tariff sheets, in a form satisfactory to the Commission, containing the appropriate rates and charges for such contingency as set forth on page 5 hereof.

(D) In the event subsequent action by this Commission or the courts results in reduction in the cost of gas purchased by Northern from Phillips Petroleum Company and Shamrock Oil and Gas Corporation and the companies involved in and affected by cases questioning the Kansas Minimum Price Orders during the period the rates provided by paragraphs (B) and (C) hereof shall be in effect, Northern, within 30 days from the effective date of the order or orders (including judicial review) resulting in such reduction in cost of gas, shall file schedules providing reduced rates reflecting the future reduction in cost of gas purchased from its said suppliers; *Provided*, however, that said reduction in rates shall be in the demand component of the rates only.

(E) In the event subsequent action by this Commission or the courts results in refunds to Northern of any portion of monies paid by Northern to Phillips Petroleum Company and Shamrock Oil and Gas Corporation and the companies involved in and affected by cases questioning the Kansas Minimum Price Orders during the period the rates provided by paragraphs (B) or (C) hereof shall be in effect, Northern, with-

in 30 days from the date of the receipt of such refund, shall refund to those entitled thereto the portion thereof attributable to jurisdictional sales; *Provided,* however, that refunds paid in accordance with this paragraph shall not bear interest.

(F) The computation of the reduction in rates and refunds provided in paragraphs (D) and (E) hereof shall be on the basis of the jurisdictional portion of the total adjusted 1955 sales amounting to 303,158,018 Mcf and jurisdictional billing demand units amounting to 11,935,692, all as shown in Appendix B hereto.

(G) No reduction in rates need be made by Northern as provided in paragraph (D) above, nor shall refunds be made by Northern as provided in paragraph (E) above unless and until the accumulated amount of refunds from the aforementioned supplier to Northern aggregate $120,000 or multiples thereof, except for the final refund which need not be made if the amount involved is less than $25,000.

(H) The billing demand in Northern's CD-Rate Schedules for a billing month for deliveries for a particular community or billing group served by a customer company of Northern shall be the effective contract demand and the minimum bill shall be the demand charge for the month, and any revised tariff sheets filed pursuant to paragraphs (B) and (C) hereof shall so provide.

(I) Further proceedings to determine the amount of refund of excess charges appropriate in these proceedings, other than those provided in paragraph (E) above, be and they are deferred pending further notice of the Secretary of the Commission to be issued subsequent to final determination of the appeal of Opinion No. 281 and accompanying order.

(J) Upon full compliance by Northern with all of the terms and conditions of this order, the proceedings in Docket G-9409 and G-9410 shall be terminated.

(K) This order is without prejudice to any findings or orders which have or may be hereafter made by the Commission in any proceeding now pending or hereafter instituted by or against Northern.

By the Commission.

Henry R. Domers,
Acting Secretary.

Docket Nos. G-2505, et al.

In the Matter of
Northern Natural Gas Company, et al.

(Issued July 26, 1956)

CONNOLE, COMMISSIONER, Concurring:

From the terms of the stipulation read into the record of this proceeding on June 28, 1956, and from an examination of the evidence submitted to date, it is clear that the level of the demand and commodity components of the approved rates do not represent an effort to recover costs properly assignable to the demand component and commodity component respectively.

Although total revenues received under this rate schedule here approved will be sufficient to meet all operating expenses, depreciation and taxes and to provide a return on net plant, there has been no showing that the costs assignable to the commodity component will be fully met in any of the zones. This becomes of critical importance where interruptible sales are proposed at rates no higher than this component and are justified by the Company to the Commission on the theory that fully allocated costs for the proposed services would be met.

To this extent the settlement represents a departure from long established and firmly grounded regulatory rate

making policy. I should be compelled to dissent from the conclusions reached by my brothers in this proceeding on that account alone, despite the apparent willingness of customers and Company to accept the settlement, if to do so would serve any useful purpose. Clearly, however, it would not.

Let the record show, however, that the rates here authorized do not purport to represent properly allocated commodity and demand costs. They must not be cited, as experience has shown such rates frequently are, to support rate levels in other proceedings where such costs are determinative.

And let the record show further, and show it unmistakably, that this Commission cannot, and does not hereby, condone the almost unavoidable discriminations inherent in sales made below cost. Whether or not the perpetuation of interruptible sales at rates below cost is inevitably destructive of the financial stability of the Company, as it appears clearly to me to be, remains to be seen. I approve this settlement, not because I do not believe such to be the case or because I think the risk has been minimized. I approve it only because the total dollars do not appear to yield more than a reasonable return and because at this tardy date, with the policy long set, no other course of action remains open to us. The Company has apparently embarked on a course designed to attract off-peak sales to fill what would otherwise be a dangerous valley in its business without due regard to the revenues to be received from them. When these sales are being made below cost and when competitive forces make it impossible to raise the rates for

the sale above costs, it is clear that such a course is not even a palliative, much less a cure, for the load factor problem. Worse, it could result in a fatal aggravation of it. Would that this Commission had long ago set its cannon 'gainst such self-slaughter.

WILLIAM R. CONNOLE, *Commissioner.*

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 15,424

Northern Natural Gas Company, a corporation,

Petitioner,

vs.

FEDERAL POWER COMMISSION,

Respondent

(May 14, 1957)

ORDER ON DISTRIBUTION OF ACCUMULATED STAY FUNDS

Before Sanborn, Woodrough and Johnsen, Circuit Judges.

Johnsen, Circuit Judge.

Northern Natural Gas Company has made application for an order directing the distribution of the sums collected by it under our stay order of November 18, 1955. Operation of the stay was terminated by us as of December 27, 1956, following our affirmance of Opinion and Order No. 281 of the Federal Power Commission, in *Interstate Power Co. v. Federal Power Commission*, 8 Cir.,

236 F. 2d 372, and denial by the Supreme Court of certiorari thereto, in *Northern Natural Gas Co. v. Federal Power Commission*, 77 S. Ct. 352.

Our stay order had permitted Northern Natural to continue its previous rates in effect against its distributors in the territorial area involved, pending review of the Commission's order, subject to certain conditions, one of which was that "Northern Natural Gas Co. shall make refund of the amounts so collected, in such manner and to such persons as the Court may direct, with interest thereon at such rate as the Court may fix, not exceeding six per cent per annum, and with Northern Natural to bear the expense, or such part thereof as the Court may require, of making such refunds and of effecting a complete disposition of the accumulated fund."

The matter has been duly heard on the application made by Northern Natural, and on the responses, answers, requests, claims and showings of the various distributors who have made appearance in the proceeding, and on the suggestions made by the Federal Power Commission in relation thereto.

The Court, after consideration, hereby finds, concludes, holds and orders as follows:

1. The total of the sums collected by Northern Natural under our stay order is $1,561,887.13, received from distributors as follows:

(a) Central Electric and Gas Co.	$351,594.09
(b) Central Natural Gas Co.	11,639.45
(c) City of Guthrie Center, Iowa	2,700.52

(d) City of Harlan, Iowa	6,272.14
(e) City of Hawarden, Iowa	2,075.41
(f) City of Ponca, Nebraska	1,842.75
(g) Council Bluffs Gas Co.	75,114.00
(h) Elkhorn Valley Gas Co.	3,770.34
(i) Iowa Electric Light & Power Co.	112,948.90
(j) Iowa-Illinois Gas & Electric Co.	61,076.80
(k) Iowa Power & Light Co.	292,571.46
(l) Iowa Public Service Co.	179,093.13
(m) Kansas Power & Light Co.	64,417.92
(n) Metropolitan Utilities District	343,980.00
(o) The Nebraska Natural Gas Co.	33,408.42
(p) North Central Public Service Co.	12,105.99
(q) Town of Coon Rapids, Iowa	2,451.55
(r) Town of Remsen, Iowa	2,003.30
(s) Village of Pender, Nebraska	2,820.96

2. Northern Natural will be required to make or effect distribution of each of these sums, as hereinafter directed, together with 6 per cent interest thereon per annum, from the respective dates that the monies accumulatingly have come into its hands, to February 17, 1957, when the present application for an order of distribution was made by it to the Court. Should Northern Natural become responsible for any acts of delay in effecting such distribution, the Court may by supplemental order require payment of interest by it beyond the date specified.

3. Our stay order declared that, in the granting of the stay, we were influenced in part by "the question of where ultimate consumers are likely to be left in the situation and how they can best be protected generally." We pointed out that it appeared from the information before us that all of the distributors involved, with perhaps a local exception, were going to continue "to charge their consumers the same rate as before, until the * * * review proceeding is disposed of, without giving them the benefit of the rate reduction which would accrue to the distributors, if Northern Natural's request for a stay should be denied"; that, without a stay being granted, ultimate consumers thus would, in case the Commission's order was affirmed, have been and be without protection in the situation, but that, if a stay was granted, and if the Commission's order should be affirmed, "Northern Natural can be required by us to make refund (of the sums collected) to ultimate consumers." We included a provision in our order, however, that, "if any distributor * * * shall, since the issuance of Opinion and Order No. 281 (of the Commission) have reduced its rates to its consumers, pursuant to and in an amount equivalent to the reduction accruing to it thereunder, or if any such distributor shall hereafter take such action, it may make application for consideration by the Court of a partial vacating or nullifying of the operation of the stay order in its application to such distributor."

4. The stay order further specifically stated that the funds which we were allowing to be collected by Northern Natural, through our continuing in effect its previous rates, were, "in their accumulation, holding and contemplated disposition, * * * intended to be for the benefit of ulti-

mate consumers as a class, but no legal right in relation to their distribution shall exist in or become vested in any individual consumer to any part thereof, except as such a right may hereafter be established and decreed by the Court, in relation to persuading equities and administrative practicalities."

5. As regards the distributors and the amounts enumerated in sub. (c), (d), (e), (f), (n), (q), (r) and (s), of paragraph numbered 1, supra, Northern Natural is hereby directed to make payments of such sums, and interest thereon as above provided, to the respective distributors, unconditionally—all of such distributors being municipalities or municipal corporations, and the making of refund to them in their public status and capacity being in our opinion (as discussed by us in a preceding case, Northern Natural Gas Co. v. Federal Power Commission, 8 Cir., 215 F. 2d 892, 897-898) sufficiently able to serve in the situation involved the underlying aim of the Natural Gas Act to protect in broad gauge ultimate consumers of Natural Gas from excessive charges, as such charges could have a part of their sources in interstate distribution.

6. As to the distributors and the amounts set out in sub. (a), (g), (h), (i), (j), (k), (l), (m), (o), and (p), of paragraph numbered 1, supra, Northern Natural will be required to make or effect distribution of such sums, to the ultimate consumers (as the class is fixed by paragraph numbered 7 hereof) of the respective distributors, in the amount which each such ultimate consumer has been required to pay of the accumulated sum, together with interest thereon as above provided. Northern Natu-

ral will be permitted to make or effect such distributions through the various distributors involved, by making arrangements with the distributors to calculate the amount which has been paid by each of its ultimate consumers (as fixed by paragraph numbered 7 hereof) and the interest allocable thereto, and crediting the account of the customer therewith on the records of the distributor. Northern Natural shall have the right to turn the funds over to the distributors as such account creditings are completed by the distributors and in the amount thereof. Northern Natural shall pay to the distributors the amount of the costs or charges made by them, except that any charge made by a distributor for services rendered in so effecting refunds to ultimate consumers, shall be subject to examination and determination by the Court, if it is unreasonable.

7. For purposes of the distribution herein contemplated, and in its administrative significance here, the term "ultimate consumer" has reference to and means those patrons or customers of the distributor who still are users of its gas, on the date of this order, and so subject to billing by the distributor. See *Northern Natural Gas Co. v. Federal Power Commission*, 8 Cir., 225 F. 2d 886, 889. Our stay order, as has been previously indicated, was specifically made to provide that, in the event of an affirmance of the Commission's order, "the funds, * * * in their accumulation, holding and contemplated disposition, are intended to be for the benefit of ultimate consumers as a class, but no legal right in relation to their distribution shall exist in or become vested in any individual consumer to any part thereof, except as such a right may hereafter be established and decreed

by the Court, in relation to persuading equities and administrative practicalities." What we said in a previous similar situation, *Northern Natural Gas Co. v. Federal Power Commission*, 8 Cir., 215 F. 2d 892, 900, may be repeated here: "The task of trying to locate persons who are no longer customers or patrons of the distributor involved, the heavy expense incident thereto, and the impossibility in the end of finding a substantial part of such persons, as shown by the court's experience in similar cases in the past, make such an attempt, in relation to the small amounts usually involved in the refunds to such persons, and to the judicial burden resulting, impractical, unfeasible, and unnecessary to an accomplishment generally of the purposes of the Natural Gas Act." We accordingly fix and limit the rights of patrons or customers of the distributors, in and to any part of the stay funds, upon the basis of their being within the term "ultimate consumers," in the class use and significance herein accorded it as a matter of administrative practicality and necessary judicial-distribution reality, and hold that this recognition and establishment, and the making of refund to ultimate consumers in accordance with the provisions of paragraph numbered 6 and this paragraph, will be sufficiently accomplishive of the object of, and the Court's responsibility under, the stay order, and the relationship of the stay fund to the aim of the Natural Gas Act.

8. In providing for the distribution directed by paragraphs numbered 6 and 7, we have given consideration to the requests and attempts of some of the distributors to have the funds turned over to them, with the right to retain them for their own use and not have to make dis-

tribution of them to their patrons and customers. Most of these requests and attempts are predicated upon the contention in substance that the rates which they have allowed to exist against their customers through the stay period are too low under present economic conditions and that the awarding to them of the funds would therefore be fair and equitable and would not give rise to any windfall in their favor. Some distributors have sought to have us examine figures and showings as to their rates, costs and earnings. These are not questions with which we have any concern either generally or in the present proceeding. As our stay order indicated, it appeared from the information before us that the distributors were not going to pass on to their consumers, while the review proceeding was pending, the reduction which the Federal Power Commission's order directed Northern Natural to make to the distributors, in its presumable relationship to their existing rates against their consumers, and it was to protect ultimate consumers in this seeming, prima facie right to a benefit of the reduction, as related to Northern Natural's charge against the distributor, that our stay order was in part granted. This was clearly stated in the order, and there was no basis for any distributor to hope or expect that the unreduced amounts so collected by it from its consumers and paid in under the stay order would be refunded to it, as a matter of whether it would have been warranted in charging its consumers a higher rate than its existing one, on the basis of factors going beyond the price paid by it to Northern, as that component was entitled to be regarded to have been properly included in its existing rate. Certainly, the reduction in Northern Natural's

charge ordered by the Commission affords as such no legal or equitable basis for the distributors to urge that they are entitled to a refund of the stay monies. This is as far as it is necessary for our consideration to go. The consideration of whether a distributor is in other respects or on other grounds entitled to charge its consumers a higher rate is for the local legislative body which has the power to deal with its rates, and not for us. And equally, the matter of what distribution should be made of the stay funds collected under our order is, of course, for us and not for the city councils with which the distributors are dealing, so that we can hardly, in our judicial responsibility, be greatly guided or affected by the mere declarations which some of the distributors have obtained from their city councils, that it is agreeable to or recommended by the latter that we make refund of the stay funds to the distributors. The requests and claims of the various distributors for refunds to them, as against their ultimate consumers, are accordingly denied.

9. As to Central Natural Gas Co. and the funds referred to in sub. (b) of paragraph 1 hereof, that distributor made showing to us on January 9, 1956 that it had before our stay order was entered reduced its rates to its consumers in the amount of the saving which would be effected by it under the Commission's order and pursuant to that order and thus was within the operation of paragraph numbered 6 of our stay order, providing for a right "to make application for consideration by the Court of a partial vacating or nullifying of the operation of the stay order in its application to such distributor." Central Natural Gas Co. may, within 15 days from

the date of this order, make showing under oath, to be filed in the office of the Clerk, that it has continued through the period covered by the stay to allow such rate reduction to remain in effect to its consumers, or, if it has made any subsequent increase in its rates against its consumers, to state when the increase was placed in effect and what part of the funds held by Northern Natural was paid by it subsequent to the increase. Further order will thereafter be entered in relation to the funds involved.

10. As to Iowa-Illinois Gas & Electric Co., referred to in sub. (j) of paragraph numbered 1 hereof, there is involved, in addition to the amount ordered distributed to its consumers under paragraph numbered 6 hereof, the sum of $12,498.20, which was not paid by it to Northern Natural under the stay order, because it had previously made a reduction to its consumers in the amount of the reduction ordered against Northern Natural by the Commission's order and pursuant to that order, and had requested the Court to vacate or nullify the operation of the stay order as to it. This reduction was allowed to remain in effect until December 15, 1955. Iowa-Illinois Gas & Electric Co. is hereby declared not to be required to make payment of such sum of $12,498.20 to Northern Natural, and Northern Natural is hereby released from any responsibility for it in relation to its obligation under our stay order and this order of distribution.

11. If, on the distribution required by paragraphs numbered 6 and 7, hereof, it shall develop that there are any patrons or customers of a distributor who have

ceased to be such prior to the date of this order, and who thus are not within the class use of the term "ultimate consumers," to whom refunds are required to be made, Northern Natural shall pay the amounts which such patrons or customers as are outside the class would have been entitled to receive, including interest, to the Clerk of this Court, to be held by the latter, subject to the Court's further direction. The Court may, in its discretion, give consideration to a use of such funds, in whole or in part, to help pay the costs of distribution, with which Northern Natural has been made chargeable hereunder. Or the Court may direct such other application or distribution of such funds, if any, as it deems appropriate in serving the general purpose of the Natural Gas Act in relation to the stay order, and as will enable complete disposition to be effected of the stay matter and its incidents.

12. Report shall be made by Northern Natural to the Court, on or before four months from the date hereof, of the progress which has been made in effecting the distribution herein provided for. The Court will, and reserves jurisdiction to, enter all further orders necessary to complete distribution of the stay funds. Final report shall be made by Northern Natural after the distribution required of it has been completed, with such provisions and showing as the Court may at that time direct.

All of which is so ordered.

A true copy.

Attest: Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 15,424

Northern Natural Gas Company,
a Corporation.

Petitioner,

vs.

Federal Power Commission,

Respondent.

ORDER DENYING PETITIONS FOR REHEARING AND CONDITIONALLY GRANTING STAY OF OUR DISTRIBUTION ORDER OF MAY 14, 1957

On consideration of the petition for rehearing filed by The Kansas Light & Power Co. to our distribution order of May 14, 1957, and of the petition for rehearing filed by Iowa Public Service Co., North Central Public Service Co., Iowa Electric Light & Power Co., Council Bluffs Gas Co., and Iowa Power & Light Co., it is ordered that each of such petitions for rehearing be and hereby is denied.

It is further Ordered that a stay of such distribution order, in its operativeness as to the consumers of any distributor covered by paragraph numbered 6, thereof, shall be and hereby is granted in favor of each such distributor individually as shall desire to petition the Supreme Court for a writ of certiorari to the distribution order, and as shall file in the office of the Clerk, within 15 days from the date of this order, its separate bond

and undertaking, in the form running to the Court, with proper surety, to be approved by the Clerk of the Court, in an amount equal to 10 per cent of the sum ordered by us to be distributed by Northern Natural Gas Co. to such distributor's consumers, as set out in paragraph numbered 1 of our distribution order; the condition of such bond to be that the distributor will, if certiorari is denied by the Supreme Court, or if our distribution order is affirmed by the Supreme Court, or if the distributor fails to prosecute its petition for certiorari to effect, make calculation of and payment to each of its ultimate consumers, as defined and fixed in paragraph numbered 7 of our distribution order of May 14, 1957, of interest at the rate of 6 per cent per annum, on the amount (of principal and interest) ordered by our distribution order to be distributed by Northern Natural Gas Co. to such ultimate consumers, such obligation for interest on the part of a distributor to extend from the date of this order to the date that the interest is credited on the distributor's records to the consumer's account, or until payment thereof otherwise is made by the distributor to the consumer.

The operativeness of our distribution order in favor of the ultimate consumers of a distributor will not be given or have stay in respect to such distributor, except upon the distributor's compliance with the foregoing conditions. Northern Natural Gas Co. is directed to proceed with the distributions required by our order of May 14, 1957, except as to the consumers of any such distributor as shall have fulfilled the conditions of this order for the obtaining of a stay.

June 24, 1957

Office - Supreme Court, U.S.
FILED
OCT 15 1957
JOHN T. FEY, Clerk

In the Supreme Court of the United States

October Term A. D. 1957

No. 427

NORTH CENTRAL PUBLIC SERVICE COMPANY,
IOWA PUBLIC SERVICE COMPANY,
IOWA POWER AND LIGHT COMPANY,
IOWA ELECTRIC LIGHT AND POWER COMPANY,
and COUNCIL BLUFFS GAS COMPANY,

Petitioners,

vs.

NORTHERN NATURAL GAS COMPANY, and
FEDERAL POWER COMMISSION,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF OF PETITIONERS

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COCKLE PRINTING COMPANY, LAW BRIEFS, OMAHA

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In the
Supreme Court of the United States

October Term A. D. 1957

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NORTH CENTRAL PUBLIC SERVICE COMPANY,
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Respondents.

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REPLY BRIEF OF PETITIONERS

ARGUMENT

In the brief of Federal Power Commission it is stated that petitioners did not mention the decision of this Court in *Federal Power Commission vs Interstate Natural Gas Company*, 336 U. S. 577, and that that case sharply limits the decision in *Central States Electric Company v. City of Muscatine*, 324 U. S. 138. Brief comment must be made on this statement.

Petitioners did not cite that case for the reasons that the Court was there dealing with interstate pipe-

line companies engaged in the wholesale distribution of natural gas and as such, expressly subject to federal jurisdiction under the Natural Gas Act, and that the Central States case was not overruled by that decision and, therefore, must be considered the law applicable to these petitioners and their consumers. Regardless of what the Court said in that opinion, it is not authority for the claim that the federal courts have the power and jurisdiction to regulate and adjudicate the respective rights of these petitioners and their ultimate consumers to this refund. That determination must be made under the laws of the State of Iowa."

Comment is made by Federal Power Commission upon the case of *Cities Service Gas Company v. Federal Power Commission*, 176 F. 2nd 548 (C.A. 10), which attempts to limit the scope and effect of that opinion. It is very obvious from an examination of the decision that the Tenth Circuit Court of Appeals considered the Muscatine case to be the law applicable to local distributors, not engaged in interstate commerce, such as these petitioners are, when after an exhaustive review of the decisions in the Muscatine and Interstate Natural Gas Company cases, the Court said:

> "We, accordingly, conclude that the Muscatine case is not overruled and that it applies to those cases in which the distributing companies are local companies, not engaged in commerce, while those cases in which the distributing companies claiming the fund as against the pipeline companies are engaged in commerce fall within the decision in the Interstate Natural Gas Company case. It seems to us that if the Muscatine case is to be given force and effect, the conclusion must be that in those cases in which the local distributing companies are en-

gaged in intrastate business only, the Federal Court is without jurisdiction to adjudicate a controversy as to the ownership of the impounded funds between such companies and the ultimate consumers, and that in such cases it should withhold distribution of the funds to afford the ultimate consumers an opportunity to have an adjudication of such controversy in a timely proceeding filed in a state tribunal of competent jurisdiction. If we are in error in this then we fail to see what, if anything, is left of the Muscatine case."

Had the Circuit Court of Appeals for the Eighth Circuit followed this reasoning, it would have ordered the refund paid to these petitioners as there was no dispute between them and their ultimate consumers. Thus the quotation shows the present disagreement between the Circuit Courts as to the state of the law.

It is respectfully submitted that the petition for writ of certiorari should be granted.

Respectfully submitted,

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In the Supreme Court of the United States

October Term, 1957

No. 427

NORTH CENTRAL PUBLIC SERVICE CO., ET AL.,
PETITIONERS

v.

NORTHERN NATURAL GAS COMPANY, AND
FEDERAL POWER COMMISSION

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

OPINION BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit (Pet. App. D. 96-106) is reported at 245 F. 2d 447.

JURISDICTION

The order of the Court of Appeals was entered on May 14, 1957 (Pet. App. D. 106). A petition for rehearing, timely filed, was denied on June 24, 1957 (Pet. App. E. 107). The petition for a writ of cer-

tiorari was filed on September 4, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTION PRESENTED

Whether a fund accumulated under a stay pending judicial review of a Federal Power Commission order reducing the rates charged by a natural gas company was properly ordered distributed to the ultimate consumers of the gas rather than to the local distributing companies which had purchased the gas from the natural gas company.

STATEMENT

On May 20, 1955, the Federal Power Commission ordered Northern Natural Gas Company, a natural-gas company under the Natural Gas Act, to establish certain zone rate differentials for its sales of natural gas subject to the Commission's jurisdiction (Pet. App. A. 24-70). This order was entered in a proceeding (Docket No. G-2217) under Section 4(e) of the Natural Gas Act to consider a general rate increase proposed by Northern Natural (Pet. App. A. 27). Certain customers of Northern Natural intervened and complained that the pipeline's existing structure of uniform system-wide rates was unduly discriminatory as to them in violation of Section 4(a) of the Act (Pet. App. A. 28). On January 28, 1954, the Commission approved a Stipulation for Settlement, agreed to by all the parties, which settled all the issues raised except that of zone rate differentials and reserved that question for further hearings (Pet. App. A. 27-28). In accordance with the approved

Stipulation, Northern filed revised rate schedules (with uniform rates) which became effective as of December 27, 1953 (Pet. App. A. 29). After further hearings on the reserved question, the Commission issued the order of May 20, 1955, requiring Northern Natural to establish rate differentials in three prescribed zones (Pet. App. A. 24-70).

In the meantime, Northern Natural, on July 2, 1954, had filed new proposed rate schedules seeking to increase its rates by an additional $8,128,405 annually (Pet. App. A. 59). The Commission instituted a new proceeding on these further rate increases (Docket No. G-2505) in which it suspended the proposed increases until December 27, 1954, when the proposed increases became effective, subject to such refunds as might thereafter be ordered by the Commission (Pet. App. A. 59-60). Pursuant to the Commission's order directing zone rate differentials in Docket No. G-2217, Northern Natural, on July 5, 1955, filed rate schedules for the three zones (Pet. App. C. 80). The Commission permitted these revised schedules to become effective as of June 27, 1955, subject to refund, in substitution of the rate schedules originally filed in Docket No. G-2505 which themselves had been in effect, subject to refund, since December 27, 1954 (Pet. App. C. 80).

On September 9, 1955, Northern Natural sought review in the court below of the Commission's order requiring zone rates (Pet. App. C. 80). Ancillary to its petition for review, Northern Natural sought a partial stay of the Commission's order, requesting the court below to permit it to collect in Zones 1 and

2 the uniform rate which had been in effect prior to its filing of zone rates while, at the same time, continuing to collect the higher zone rate in Zone 3. In granting the partial stay as requested, the Court of Appeals stressed that the stay would provide the best means of protecting the ultimate consumers (Pet. App. B. 73-74):

> It appears from the information before us on the hearing that the distributors in Zones 1 and 2 (with perhaps a local exception) are going to continue to charge their consumers the same rate as before, until the present review proceeding is disposed of, without giving them the benefit of the rate reduction which would accrue to the distributors, if Northern Natural's request for a stay should be denied. Thus, the four intervener-distributors who have appeared in resistance to Northern Natural's request for a stay, have apparently to date made no reduction to their consumers, nor have they urged any desire or intention on their part to do so as a basis for their objection to the granting of the stay. It is perhaps only natural that, even without a stay, any distributor in Zones 1 and 2 would seek to safeguard itself against the possibility of being held liable to Northern Natural for any additional amount over the zone rate, in case the Commission's order should be reversed.
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> But in case the Commission's order should be affirmed, the Court, without a stay having been granted, will be in no position to protect ultimate consumers. If a stay is granted, Northern Natural can be required by us to make refund to such ultimate consumers. • • •

The Court of Appeals subsequently affirmed the Commission's order in all respects (*Interstate Power Company* v. *Federal Power Commission*, 236 F. 2d 372) and this Court denied certiorari. 352 U.S. 967.

Following the denial of certiorari, Northern Natural, on February 17, 1957, moved the court below for an order directing the distribution of the $1,561,887.13 collected under the stay order from its customers in Zones 1 and 2. (Pet. App D. 97-98) Pointing out that it had granted the stay in order to protect the ultimate consumers, but that it had made provision for refund to a distributing company which during the stay period reduced its rates pursuant to and in an amount equivalent to the reduction accruing to it under the stayed order of the Commission, the court below directed Northern Natural to make direct unconditional refunds to a number of distributing companies which, being municipal corporations with a public status and capacity, would, in any case, be operated for the benefit of ultimate consumers (Pet. App. D. 99-100). As to the other purchasers from Northern Natural in these zones, including petitioners here, the court rejected their claims to the refund and, in accordance with the terms of its stay order, directed that the monies be refunded to the ultimate consumers (Pet. App. D. 100-101).

ARGUMENT

1. Petitioners' primary contention is that the actions of the court below, in refusing to distribute the refund to them and instead directing that the monies be distributed to their ultimate consumers, is in con-

flict with *Central States Electric Co.* v. *City of Muscatine*, 324 U.S. 138 (Pet. 13-15). In *Central States*, according to petitioners, this Court had held that, in distributing a fund accumulated under a stay such as is here involved, a court of appeals has no choice but to distribute the money to the local distributing company, rather than its ultimate consumers, since "that court had no power to fix rates—that being a legislative function of the State of Iowa" (see Pet. 14).

In so urging, however, petitioners fail to take into account the fact that *Central States* was sharply limited by this Court in its later decision in *Federal Power Commission* v. *Interstate Natural Gas Co.*, 336 U.S. 577, a case not mentioned by petitioners. *Interstate*, which we believe is controlling, also involved the proper disposition of a fund accumulated under a stay issued by a court of appeals pending review of a Commission order reducing rates for wholesale sales of natural gas. In that case, the Court of Appeals, relying on *Central States*, had ordered distribution of the accumulated funds to the purchasing companies. This Court, however, reversed and while it commented in passing that, unlike *Central States*, the purchasing companies involved were themselves pipeline companies subject to the Commission's jurisdiction and that therefore their entitlement to the refund was a matter of federal law (336 U.S. at 580-581), it went on to recognize that the purchasing pipelines in turn resell to distributing companies for resale to ultimate consumers. In resolving the conflicting claims, this Court

noted that in ordering distribution of such a fund a court of appeals is not fixing rates, but rather is discharging its

> * * * responsibility to protect all the interests whom its injunction may affect. * * * It assumes the duty to make disposition of the fund in accord with equitable principles. * * * If in a particular case the court reaches the question of reasonableness of rates, it does so only for purposes of distributing the fund for whose creation it alone was responsible. It does not fix or prescribe rates for the past or the future. The reasonableness of rates charged by the companies who claim the fund is wholly ancillary to the problem of determining what claimants are equitably entitled to share in it. * * * [*Id.* at 582-583.]

Consequently, this Court ruled that, in passing on the claims of a distributing company *vis a vis* its ultimate consumer, the court of appeals should utilize the available sources of local law, including information from state regulatory agencies (*id.* at 583-584), and that (*id.* at 584):

> * * * the task of the federal court in distributing the fund accumulated by virtue of its stay order is to undo the wrong which its process caused. The basic problem, therefore, is not to fix rates but to determine who suffered a loss as a result of the court's action in granting the stay. What in fact would have happened as a consequence of federal or state law if the stay had not been issued, no one can know for a certainty. But the federal court must make its prognostication, whether an excursion into fed-

eral or state law questions is entailed. Distribution of the fund should not involve prolonged litigation. It is an administrative matter involving the exercise of an informed judgment by the federal court and should have the flexibility and dispatch which characterize the administrative process.

2. The court below here properly exercised its informed judgment when, in seeking "to undo the wrong which its process caused" (*Interstate* at 584), it determined that, in the circumstances of this case, its stay resulted in a loss to the ultimate consumers of petitioners, rather than to petitioners. Petitioners do not claim that the stay caused them a loss; all they claim is that they did not seek a rate increase as a result of the increased cost of natural gas. But, as this Court stated with reference to the purchasing pipelines involved in *Interstate* (at 581-582), "a court would not be warranted in assuming that the rates which have been charged are so low as to be unreasonable. No such presumption attends rates which have been fixed pursuant to rate orders of the commission. Nor can we make any such presumption as respects rates fixed by the utilities themselves without the compulsion of a rate order. For experience does not indicate that utilities are wont to charge themselves out of business."

This is fully applicable here. Petitioners' costs of the purchased gas are included in the rates charged to the ultimate consumers and so passed on to them. Petitioners are constitutionally entitled to charge rates which reimburse them for their costs of oper-

ation and in addition yield a fair return on their investment. If, on the basis of their costs, petitioners failed to earn a fair return, the usual machinery for seeking an appropriate rate increase was available to them; the court's stay in no way disabled them from invoking that machinery. Presumptively, petitioners' failure to seek a rate increase during the stay period indicates that they in fact were earning a fair return. This presumption is strongly buttressed by the fact that the court advised petitioners, at the outset, of its intention to distribute the fund which would accumulate under the stay to the ultimate consumers unless the rate decrease which was being stayed was in the interim passed on to them (Pet. App. B. 73-74). It is conceded here by petitioners that they did not pass the ordered decrease on to their ultimate consumers.

Moreover, even if petitioners did not earn a fair return during the stay period, that failure was not a result of the stay. It is only those consequences which resulted from the stay which the court should correct in distributing the accumulated fund. To bestow upon the petitioners the fund accumulated pursuant to the stay in addition to the fair return which they are entitled to seek by other means would be to give them an unmerited windfall. In this connection, notice should be taken of petitioners' claim of entitlement to refund here on the ground that, as a result of a further increase in rates filed by Northern Natural, they paid during the period of the stay rates even higher than those set by the Commission in the zone rate proceeding. These

higher rates, however, were permitted by the Commission to become effective as of December 27, 1954, subject to refund pending final Commission action thereon. Not only did petitioners, nearly a year prior to the stay order below (dated November 18, 1955), deliberately decide not to seek a rate increase based on this increase, but the increase ultimately approved by the Commission was, as anticipated by petitioners, substantially less than that proposed by Northern Natural and the Commission has directed appropriate refunds of the excess to be paid thereunder. 17 F.P.C. 770. Since petitioners' decision not to pass on this increase to its ultimate consumers was made prior to and independently of the stay order here, and this increase was in no way involved in the proceeding below, the court below properly ignored it in undoing "the wrong which *its* process caused [italics added]."

Unlike petitioners, their ultimate consumers did suffer loss as a result of the stay. In granting the stay, the court below acted in part because of its understanding that no voluntary reduction in rates predicated on reduced cost stemming from the rate reduction order would be made until final court review of the zone order. Nor were the local regulatory agencies or the consumers themselves in a position to seek a rate reduction on the basis of the Commission's rate reduction order, for until the litigation was terminated, it was uncertain whether the distributing company's cost of purchased gas would be so reduced. "[A] federal rate reduction order cannot be utilized before state regulatory agencies where the federal reduction order has been stayed by a

federal court. Thus, during the three years that the Power Commission's rate reduction was held in abeyance pursuant to the stay orders, the Iowa consumers were deprived of the opportunity to obtain a reduction of their rates from the local regulatory agencies." *Central States Electric Co.* v. *City of Muscatine*, 324 U.S. 138, at 149 (dissenting opinion). Accordingly, since the court in staying the Commission's order prevented transmission of these benefits to the ultimate consumers, it properly ordered the distribution of the fund accumulated under the stay to the ultimate consumers as the persons to whom the stay caused a loss.

3. The action of the court below does not conflict with that taken by courts of appeals in the other cases cited by petitioners (Pet. 15-16). In *Northern Natural Gas Co.* v. *Federal Power Commission*, 215 F. 2d 892 (C.A. 8), the court distributed a fund collected by Northern Natural from various distributors under an order of the court staying the Commission's order disallowing certain items of a rate increase schedule filed by Northern Natural. However, the stay there had been issued in the express anticipation that it would be operative for such a short period of time that the purchasing companies generally would not have an opportunity to seek rate increases based on the stay. It was in the light of that circumstance that the court held that the distributing companies who had made no increases to their customers during the stay period were entitled to unconditional refund orders, but those who had passed on the rate increase to their ultimate customers

were directed to make refunds to them.[1] Thus, the court there, the same panel of the Eighth Circuit as here, was concerned with correcting the wrong resulting from its stay, and the difference in the distribution of the refund flowed entirely from the difference in the factual situation.

In *Cities Service Gas Co.* v. *Federal Power Commission*, 176 F. 2d 548 (C.A. 10), the Tenth Circuit, relying on this Court's statement in *Interstate* that the federal court might hold funds if clear and speedy state remedies are available, exercised its discretion by ruling that it would retain the fund accumulated under its stay order pending the outcome of the then well-advanced state court litigation between the ultimate consumers and the local distributor. Thus, in *Cities Service*, the Tenth Circuit, as the court below, exercised its informed judgment as to the most practical method of obtaining an equitable and expeditious distribution of the accumulated fund. Again, the different procedure adopted by the Tenth Circuit was the result of a different factual situation; in the present case there was no state litigation pending to which the Court of Appeals could have turned.

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[1] To assure that the distributing companies did not receive an unwarranted windfall, the Eighth Circuit, in granting the stay, reserved jurisdiction.

> * * * to impose conditions upon the the acceptance of such funds by any utility distributing company as shall be just and equitable in relation to its consumer customers; such as requiring it as a condition of acceptance and receipt to make refund to its customers, with reasonable allowance [to it] out of the funds and interest so received by it, to cover the cost of such distribution. (215 F. 2d at 897)

Finally, in *Interstate Natural Gas Co.* v. *Federal Power Commission*, 181 F. 2d 833 (C.A. 5), the Fifth Circuit, after being reversed by this Court (see 336 U.S. 577), undertook, in accordance with this Court's directions, to examine the various conflicting claims to accumulated funds regardless of whether the rates charged the claimants were in the first instance subject to the Commission's jurisdiction, and, based on that examination, the Court directed the distribution of the accumulated fund to the public utility companies for redistribution to their customers of all excess charges not already returned in lower rates (see 181 F. 2d at 834). Far from conflicting, this action fully supports that of the court below. See, also, *Pennsylvania Water & Power Co.* v. *Federal Power Commission*, 203 F. 2d 219, 222 (C.A.D.C.).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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